

A right to legal gender recognition for transgender children in South Africa

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DECLARATION

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SUMMARY

The term *gender identity* can be defined as referring to each person's deeply felt internal experience of their gender, which may or may not correspond to the sex documented at birth. The mismatch between gender identity and identification documents has an impact on the abilities and experiences of transgender children. It may cause transgender children to experience discrimination, marginalisation, abuse and degradation, which may adversely affect their rights to human dignity, equality, freedom and the best interests of the child as guaranteed under the Constitution of the Republic of South Africa, 1996.

Legal gender recognition refers to the official recognition of a person's gender identity in key documents and public registries. In South Africa, the Alteration of Sex Description and Sex Status Act 49 of 2003 provides for legal gender recognition procedures. However, the Act requires that certain medical preconditions have to be met in order to access legal gender recognition, which, in turn, excludes transgender children, who do not want to or cannot follow the requirements set by the Act in order to alter their gender legally.

This thesis seeks to analyse the duties placed on the South African government in terms of international law, regional law and the national legal framework, while also comparing the South African position to the position in foreign jurisdictions, in order to establish whether the right to legal gender recognition should be accessible to transgender children. Furthermore, the objective of this thesis is to show that the limitations placed on transgender children to access legal gender recognition is not reasonable and justifiable in an open democratic society based on human dignity, equality, freedom for all and is not in the best interests of transgender children. Therefore, this thesis will also provide recommendations as to how the process of access to legal gender recognition for transgender children should be realised and implemented in terms of the South African legal framework.

OPSOMMING

Die term *geslagsidentiteit* kan gedefinieer word as elke persoon se innerlike gevoel en ervaring van hul geslag, wat óf ooreenstem met die geslag wat by geboorte gedokumenteer is, of glad nie daarmee ooreenstem nie. Die wanverhouding tussen geslagsidentiteit en identifikasiedokumente kan die vermoëns en ervarings van transgender kinders affekteer. Dit kan transgender kinders blootstel aan diskriminasie, marginalisering, mishandeling en vernedering, wat die regte op menswaardigheid, gelykheid, vryheid en die beste belange van die kind skend, soos gewaarborg onder die Grondwet van die Republiek van Suid-Afrika, 1996.

Wettige geslagsherkenning verwys na die amptelike erkenning van 'n persoon se geslagsidentiteit in sleuteldokumente en openbare registers. In Suid-Afrika maak die Alteration of Sex Description and Sex Status Act 49 van 2003 voorsiening vir prosedures vir wettige geslagsherkenning. Die Wet bepaal egter dat daar aan sekere mediese voorwaardes voldoen moet word ten einde toegang tot wettige geslagsherkenning te verkry, wat gevolglik transgender kinders uitsluit om hul geslag wettig te verander weens hul onvermoë om aan die Wet se vereistes te voldoen of selfs as gevolg van die feit dat hulle dit nie wil volg nie.

Hierdie tesis poog om die pligte van die Suid-Afrikaanse regering, soos uiteengesit in terme van die internasionale reg, streeksreg en die nasionale wetlike raamwerk, te ontleed, asook om die Suid-Afrikaanse posisie te vergelyk met ander buitelandse jurisdiksies, ten einde vas te stel of die reg op wettige geslagsherkenning toeganklik moet wees vir transgender kinders. Verder is die doel van hierdie tesis om aan te toon dat die beperking wat op transgender kinders geplaas word om toegang te kry tot wettige geslagsherkenning, nie redelik en regverdigbaar is in 'n oop en demokratiese samelewing wat gebaseer is op menswaardigheid, gelykheid, vryheid vir almal nie, asook weens die feit dat dit ook nie in die beste belang van transgender kinders is nie. Daarom sal hierdie tesis ook aanbevelings verskaf oor hoe die proses van toegang tot wettige geslagsherkenning vir transgender kinders, ingevolge die Suid-Afrikaanse wetlike raamwerk, moet realiseer en geïmplementeer word.

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LIST OF ABBREVIATIONS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
ACT	Australian Capital Territory
African Charter	African Charter on Human and Peoples' Rights
Alteration Act	Alteration of Sex Description and Sex Status Act 49 of 2003
ANC	African National Congress
APA	American Psychological Association
Assembly	Parliamentary Assembly of the Council of Europe
Bill	Alteration of Sex Description and Sex Status Bill 37 of 2003
CESCR	United Nations Committee on Economic, Social and Cultural Rights
Children's Act	Children's Act 38 of 2005
Constitution	Constitution of the Republic of South Africa, 1996
DSM-4	Diagnostic and Statistical Manual of Mental Disorders (fourth edition)
DSM-5	Diagnostic and Statistical Manual of Mental Disorders (fifth edition)
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
Geneva Declaration	Geneva Declaration on The Rights of the Child
GIGESC Act	Maltese Gender Identity, Gender Expression and Sex Characteristics Act
IACHR	Inter-American Commission on Human Rights
ICD	The International Classification of Diseases
LGBTQI	Lesbian, gay, bisexual, transgender, queer and intersex
NGO	Non-governmental organisation

OAU	Organization of African Unity
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
Portfolio Committee	The Home Affairs Portfolio Committee of the South African Parliament
Resolution 2048	Parliamentary Assembly of the Council of Europe Resolution 2048
SAHRC	South African Human Rights Commission
SALRC	South African Law Reform Commission
SOCIESC	Sexual orientation, gender identity, gender expression and sex characteristics
Transgender Support Group	Cape Town Transsexual/ Transgender Support Group
UK	United Kingdom
UNCRC	United Nations Convention on the Rights of the Child
UNHRC	United Nations Human Rights Committee
WHO	World Health Organisation
WPATH	World Professional Association for Transgender Health
Yogyakarta Principles	Principles on the application of international human rights law in relation to sexual orientation and gender identity

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CHAPTER 1: INTRODUCTION

1 1 Background to research problem

Gender forms a fundamental part of an individual's identity, and the assignment thereof has significant psychological implications throughout life.¹ The term gender has two components: external gender, which refers to societal gender norms that prescribe how men and women are supposed to act; and internal gender, which refers to gender identity, in other words, the way that people self-identify and define their gender.² In children, gender identity is associated with the ability to confidently answer the question as to whether the child is a boy or a girl. Research suggests that most children can answer this question at around the age of 2.³ For some children, their gender identity does not conform to their biological sex assigned to them at birth. These children, therefore, are considered transgender.

The fifth edition of *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-5") describes *transgender persons* as a broad spectrum of persons who transiently or perpetually identify with a gender different from their biological sex.⁴ The American Psychological Association ("APA") use the term *transgender* as an umbrella term for people whose gender identity do not conform to their sex assigned at birth and includes a wide variety of identities, including transsexual people.⁵ As a result, it can be said that the term *transgender* refers to individuals who experience an unease or discomfort to identify with the sex assigned to them at birth.⁶

¹ SL Katz-Wise, SL Budge, E Fugate, K Flanagan, C Touloumtzis, B Rood, A Perez-Brumer & S Leibowitz "Transactional Pathways of Transgender Identity Development in Transgender and Gender Nonconforming Youth and Caregivers from the Trans Youth Family Study" (2017) 18 *Int J Transgend* 1434–4599, 1434. See also, SK Egan & DG Perry "Gender identity: a multidimensional analysis with implications for psychosocial adjustment" (2001) 37 *Dev Psychol* 451–463.

² Legal Resource Centre & Gender Dynamix "Briefing Paper: Alteration of Sex Description and Sex Status Act, No. 49 of 2003" (2015) www.genderdynamix.org.za <<https://www.genderdynamix.org.za/resources>> (accessed 29-05-2019).

³ JE Blakemore, SE Berenbaum & LS Liben *Gender Development* 2 ed (2008) 5.

⁴ American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 5 ed (2013) 451. The *Diagnostic and Statistical Manual of Mental Disorders* 5 ed defines it as: "The broad spectrum of individuals who transiently or permanently identify with a gender different from their *natal gender*".

⁵ It could include, for example, people described as drag queens, drag kings, queers, gender queers, intersexuals, fem queens, girls, boys, trannies, trans, feminine gay men, butch lesbians, male-to-female, female-to-male, cross-dressers, pre-op or post-op transsexuals. See American Psychological Association "Guidelines for Psychological Practice with Transgender and Gender Nonconforming People" (2015) 70 *American Psychologist* 832 862. See heading 2 2.

⁶ American Psychological Association (2015) *American Psychologist* 861.

This discomfort and unease can manifest in some individuals from a very young age. Transgender children's gender evolves differently from their biological sex assigned at birth and is something that might not fit rigid and traditional notions.⁷ In society, gender-, religious- and sexual norms often intertwine, and these aspects could have an impact on a person's capabilities and experiences.⁸ When sexual orientation or gender identity does not accord to social norms, vulnerabilities increase.⁹ Children are often expected to assume the gender of their biological sex along with the gender expectations and roles associated with it.¹⁰ Due to their dissidence with conventional gender expectations, transgender children become exposed to risk, discrimination, and marginalisation.¹¹ The mismatch between the physical appearance of the child and their¹² identification documents has a plethora of consequences on their abilities and experiences.¹³

For this reason, transgender children may experience additional daily difficulties, ranging from something as simple as using the public bathroom at school, to bullying, abuse and rejection. Constant bullying and discrimination by family members, peers and teachers, and not being able to use the preferred changing room, may adversely affect transgender children's physical and mental health, which, in turn, could affect their development and their performance in school.¹⁴ According to Köhler, these

⁷ N Ghoshal & K Knight "Rights in Transition: Making Legal Recognition for Transgender People a Global Priority" (2016) *Human Rights Watch* 1 1.

⁸ A Sørli "Legal Gender Meets Reality: A Socio-Legal Children's Perspective" (2015) 33 *Nordick Journal of Human Rights* 353 354.

⁹ UNICEF "Eliminating Discrimination Against Children and Parents Based on Sexual Orientation And/ Or Gender Identity" No. 9, UNICEF, New York, November 2014 *UNICEF* <<https://uni.cf/2npsbuM>> (accessed 04-05-2017).

¹⁰ AH Grossman & AR D'Augelli "Transgender Youth: Invisible and Vulnerable" (2009) 51 *The Pennsylvania State University* 111 112.

¹¹ 111.

¹² The Yogyakarta Principles – Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity ("Yogyakarta Principles") are expressed in exclusively gender-neutral terms. This approach was adopted deliberately to ensure the application of all aspects of the Yogyakarta Principles with regard to the life experiences of individuals regardless of their gender identity, while also avoiding the binary construction of gender. In giving effect to the Yogyakarta Principles and for the purpose of promoting inclusivity, this thesis uses terms such as "them" and "their" for all genders even when referring to a single individual. See International Commission of Jurists "The Yogyakarta Principles Plus 10 – Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement" (10-11-2017) *ERA* <https://www.lgbti-era.org/sites/default/files/pdfdocs/A5_yogyakartaWEB-2.pdf> (accessed 30-05-2019). See Annexure A of this thesis for the Yogyakarta Principles. See also heading 5 of Chapter 3 for a detailed discussion on the Yogyakarta Principles.

¹³ Legal Resource Centre & Gender Dynamix "Briefing Paper: Alteration of Sex Description and Sex Status Act, No. 49 of 2003" *www.genderdynamix.org.za* 29.

¹⁴ L Henzel "Back me up! Rights of Trans Children under the Convention on the Rights of the Child" (2016) Working paper Nr 13 *Humboldt Law Clinic* 1 12.

difficulties contribute to social exclusion and stigmas, an increase in school drop-out rates, depression, and suicidal tendencies.¹⁵ As a result, transgender children become members of a marginalised and vulnerable group of children, and their rights are often violated.¹⁶

1 2 Rationale

Research suggests that supporting transgender children in their gender identity demonstrates more desirable outcomes as support means promoting, protecting and respecting the child's best interests.¹⁷ The best interests of the child principle can be found in a number of international and regional documents and instruments dealing with the protection and promotion of the rights of children.¹⁸ These documents and instruments recognise that parents, society, and the State have obligations and responsibilities towards children. The United Nations ("UN") Convention on the Rights of the Child ("UNCRC") requires that in all actions that concern the child, their best interests shall be a primary consideration. The best interests of the child is one of the core principles and foundational values of the UNCRC.¹⁹ This principle aims to ensure the holistic development of the child, that is, the child's physical, mental, spiritual, moral, psychological, social, and educational development.²⁰ The UNCRC affords children legal protection, while acknowledging them as subjects with rights.²¹

Articles 2, 3, 6 and 12 encapsulates the core values of the UNCRC. The dignity of all children and their equal and inalienable rights as human beings form part of the core principles of the UNCRC.²² The UN Committee on the Rights of the Child ("Committee") emphasises that all children must be granted the same rights in a non-

¹⁵ R Köhler "Legal Gender Recognition and the Best Interests of the Child" TGEU Policy Paper (2018) *TGEU* <<https://tgeu.org/wp-content/uploads/2019/04/D32-Policy-Brief-Legal-Gender-Recognition-for-Children.pdf>> (accessed 29-05-2019).

¹⁶ These rights will be introduced and discussed under the rationale for the thesis. See Grossman & D'Augelli (2009) *The Pennsylvania State University* 112.

¹⁷ KR Olson, L Durwood, M DeMeules & KA McLaughlin "Mental Health of Transgender Children Who Are Supported in Their Identities" (2016) 137 *Pediatrics* 3 1–8.

¹⁸ See discussion under heading 3 4 2.

¹⁹ The UNCRC has been described as the first binding codification of children's rights. See Henzel (2016) *Humboldt Law Clinic* 6.

²⁰ Henzel (2016) *Humboldt Law Clinic* 10. See also UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, UN Doc E/C.12/2000/4.

²¹ Henzel (2016) *Humboldt Law Clinic* 6.

²² UN Committee on the Rights of the Child (UNCRC), *General Comment No. 1 (2001), Article 29 (1), The aims of education*, 17 April 2001, UN Doc CRC/GC/2001/1.

discriminatory manner.²³ In addition, the Committee stresses that Article 2 of the UNCRC requires States to actively identify children and groups of children who might need special measures, such as changes in legislation, administration and educational measures, to ensure that their rights are being recognised and realised.²⁴ These “special measures” should thus aim to eliminate all forms of discrimination which would improve capabilities and experiences along with the implementation of rights.²⁵

Considering the above-highlighted vulnerabilities, marginalisation, and discrimination of transgender children, international and regional law places a number of duties on Member States. For example, Article 21 of the African Charter on the Rights and Welfare of the Child (“ACRWC”) places a duty on Member States to eliminate harmful social and cultural practices affecting the child’s welfare, dignity, normal growth, and development. Article 2 of the UNCRC places a duty on all Member States to respect and ensure the rights enshrined in the Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.²⁶ Further, Article 8 of the UNCRC obligates Member States to respect the right of the child to preserve their identity.

The duty of considering the best interests of the child principle is further echoed in section 28 of the Constitution of the Republic of South Africa, 1996 (“Constitution”) as being of paramount importance in every matter concerning the child. The Constitution sets out a range of rights in section 28 that aims to provide protection for children, in addition to the general measures of protection granted in the remainder of the Bill of

²³ UN Committee on the Rights of the Child (UNCRC), General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, UN Doc CRC/GC/2003/5. See also Article 2(1) of the Convention on the Rights of the Child (UNCRC). See also Henzel (2016) *Humboldt Law Clinic* 8.

²⁴ UN Committee on the Rights of the Child (UNCRC), General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, UN Doc CRC/GC/2003/5.

²⁵ Henzel (2016) *Humboldt Law Clinic* 9.

²⁶ Article 2 reads:

“1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members”.

See also A Bucataru “Using the Convention on the Rights of the Child to Protect the Rights of Transgender Children and Adolescents: The Context of Education and Transition” (2016) 3 *QMHR* 59 62.

Rights.²⁷ Section 28 grants children the right to a name, basic health care services and social services, and guarantees protections against maltreatment, neglect, abuse or degradation. The Constitutional Court has stressed that section 28 should be regarded as responding in an “expansive way” to the country’s international obligations as a Member State to the UNCRC. Further, the court emphasised that the UNCRC should be seen as the international standard against which legislation and policies should be measured.²⁸ In addition to section 28, section 8, the application clause, states that the Bill of Rights is applicable to all organs of state while also binding natural and juristic persons, should the nature of the right so permit.²⁹ The South African government should thus apply rights and policies in accordance with the foundational values set out by the Constitution, international-, and regional law.³⁰

In terms of the national legal framework, section 9 of the Constitution provides for the right to equality, and specifically in its subsection (3), protection from unfair discrimination based on sex, gender, and age.³¹ Section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“PEPUDA”) provides a further prohibition on discrimination based on gender. In addition, section 10 of the Constitution guarantees the right to human dignity for all. It has been argued that the ability to ensure that one’s identification documents accord to one’s gender identity is instrumental to protect, promote and respect the right to human dignity.³² Furthermore, section 12 of the Constitution guarantees the right to freedom and bodily integrity.

In 2007, the Yogyakarta Principles – Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (“Yogyakarta Principles”) was issued as a response to the recorded patterns of human rights violations experienced by people of diverse sexual orientations, gender identities, sexual-, and gender expressions.³³ Furthermore, the Principles identify the policing of

²⁷ I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 599.

²⁸ *Sonderup v Tondelli* 2001 1 SA 1171 (CC) para 29 and *S v M* 2008 3 SA 232 (CC) para 16. See also Currie & De Waal *The Bill of Rights Handbook* 601.

²⁹ Currie & De Waal *The Bill of Rights Handbook* 600.

³⁰ WJ van Vollenhoven & CJ Els “The human rights paradox of lesbian, gay, bisexual and transgender students in South African education” (2013) *De Jure* 263 265.

³¹ Sex is referred to as it is often conflated with gender. See heading 2.2.3 below

³² Legal Resource Centre & Gender Dynamix “Briefing Paper: Alteration of Sex Description and Sex Status Act, No. 49 of 2003” www.genderdynamix.org.za 34.

³³ The preamble states that:

“The Yogyakarta Principles affirm binding international legal standards with which all states must comply. They promise a different future where all people born free and equal in dignity and rights can fulfil that precious birth right”.

See Annexure A of this thesis.

sexuality as a major force behind the continual gender-based violence and gender inequality. Classified as soft law, the Yogyakarta Principles highlight the critical importance of collating and clarifying State obligations under existing international human rights laws. This, in turn, will promote and protect human rights for all on the basis of equality without discrimination.³⁴ The Yogyakarta Principles acknowledge that everyone is born free and equal in dignity and rights.³⁵ The Yogyakarta Principles recognise sexual orientation and gender identity as an integral part of every person's dignity and humanity, and it should never form the basis for discrimination or abuse.³⁶ The Yogyakarta Principles provide for legal gender recognition using a self-determination model. The self-determination model allows for all individuals to alter their gender legally without imposing discriminatory prerequisite requirements such as age, reports on medical treatments, or medical surgeries.³⁷

In South Africa, legal gender recognition procedures are provided for in terms of the Alteration of Sex Description and Sex Status Act 49 of 2003 ("Alteration Act"). Section 2 of the Alteration Act states that:

"(1) Any person whose sexual characteristics have been altered by surgical or medical treatment or by evolvment through natural development resulting in gender reassignment, or any person who is intersexed may apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register.

(2) An application contemplated in subsection (1) must –

(a) be accompanied by the birth certificate of the applicant;

(b) in the case of a person whose sexual characteristics have been altered by surgical or medical treatment resulting in gender reassignment ... be accompanied by reports stating the nature and results of any procedures carried out and any treatment applied prepared by the medical practitioners who carried out the procedures and applies the treatment or by a medical practitioner with experience in the carrying out of such procedures and the application of such treatment;

(c) in every case in which sexual characteristics have been altered resulting in gender reassignment, be accompanied by a report, prepared by a medical practitioner other than the one contemplated in paragraph (b) who has medically examined the applicant in order to establish his or her sexual characteristics".

³⁴ See the preamble of the Yogyakarta Principles as included in Annexure A of this thesis.

³⁵ Preamble of the Yogyakarta Principles. See Annexure A of this thesis.

³⁶ See the preamble of the Yogyakarta Principles as included in Annexure A of this thesis.

³⁷ See Principle 31 in Annexure A of this thesis. See also heading 4 2 2 of this thesis.

Although the provision refers to “any person”, the prerequisite stipulations should be highlighted. The Alteration Act only allows three groups of people to apply for the alteration of their sex descriptor, namely: (i) people whose sexual characteristic have been altered by surgical or medical treatment; (ii) people whose sexual characteristics have been altered through natural development resulting in gender reassignment; and (iii) people who are intersex. Before accessing legal gender recognition procedures in South Africa, an applicant is required to alter their body medically or the applicant should be born with a condition resulting in conflicting or ambiguous biological indicators of sex, that is, they should be intersex.³⁸

In this regard, the World Professional Association for Transgender Health (“WPATH”) recommends that children should only commence medical transition upon reaching puberty, which is generally at the age of 12.³⁹ Section 129 of the Children’s Act 38 of 2005 (“Children’s Act”) states that a child over the age of 12 may consent to their own medical treatment or surgical operations if the child is of sufficient maturity and have the mental capacity to understand the benefits, risks, social, and other implications associated with the treatment or operation.⁴⁰ If the Alteration Act is read with section 129 of the Children’s Act and the statements of the WPATH, it indicates that the Alteration Act excludes from its application pre-pubertal children and individuals who choose not to have their body altered for whatever reasons. Such persons are thus not allowed to have their gender legally recognised. It is evident that the Alteration Act does not provide a right to legal gender recognition for transgender children below the age of 12 or to individuals based on self-determination.

³⁸ American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 824. See heading 2 2 1 below for a detailed explanation on intersexism. Importantly, at first sight, section 2 of the Alteration Act might seem as if the Act provides for a broader access to legal gender recognition; however, further interpretation and clarification will be provided below under heading 5 3 4 and heading 6 3.

³⁹ The purpose and use of The World Professional Association for Transgender Health (WPATH) is as follows:

“The [WPATH] is an international, multidisciplinary, professional association whose mission is to promote evidence-based care, education, research, advocacy, public policy, and respect for transgender health ... to bring together diverse professionals dedicated to developing best practices and supportive policies worldwide that promote health, research, education, respect, dignity, and equality for transsexual, transgender, and gender nonconforming people in all cultural settings”.

The World Professional Association for Transgender Health *Standards of Care for the Health of Transsexual, Transgender, and Gender Non-conforming People 7th version* (2012) WPATH <<http://www.teni.ie/attachments/92d213ab-8474-4f34-a931-ab95489b2afe.PDF>> 13 (accessed 12-11-2018).

⁴⁰ In relation to surgical operations, the Children’s Act requires that the child should further be duly assisted by their parents. See heading 5 3 3 below.

The Committee has drawn on the emerging human rights violations that lesbian, gay, bisexual and transgender (“LGBT”) children are subjected to, with specific reference to discrimination. In 2016, speaking ahead of the International Day Against Homophobia, Transphobia and Biphobia on 17 May, the Committee stated that:

“Pathologization of LGBT adults and children – branding them as ill based on their sexual orientation, gender identity or gender expression – has historically been, and continues to be, one of the root causes behind the human rights violations that they face. It is also an obstacle to overcoming negative attitudes, stereotypes, and the multiple barriers for the realization of LGBT people’s most fundamental human rights... These pathologizing classifications also create abusive obstacles to access safe gender affirming procedures for trans people, which leads to preventable and early deaths resulting from unsafe and clandestine procedures ... Forced, coercive and otherwise involuntary treatments and procedures can lead to severe and life-long physical and mental pain and suffering and can violate the right to be free from torture and other cruel, inhuman or degrading treatment or punishment ... Legal and policy reforms are needed to remove discriminatory laws and protect LGBT persons from violence and discrimination. But these will not be effective or sufficient on their own while outdated medical classifications persist. These classifications should be reformed to depathologize transgender identities and expressions and same-sex attraction. States should adopt measures to prevent, investigate and prosecute all forms of forced, coercive and otherwise involuntary treatments and procedures on LGBT persons”.⁴¹

The WPATH states that “no person should have to undergo surgery or accept sterilization as a condition of identity recognition”; States should “eliminate unnecessary barriers”; and should “institute quick, transparent and accessible procedures for transgender people to obtain legal gender recognition” that aligns with their gender identity.⁴²

Furthermore, an on-going debate regarding children’s rights involves the extent to which children have the right to individual self-determination. This includes, but is not limited to, their right to choose their own lifestyle, religion, and relationships along with their gender identity.⁴³ Restricting these rights becomes more difficult to justify as the child grows older. Parental responsibilities of both the parents and the State are

⁴¹ UN Committee on the Rights of the Child et al “Pathologization – Being Lesbian, Gay, Bisexual and/or Trans Is Not an Illness” For International Day against Homophobia, Transphobia and Biphobia (17-05-2016) *OHCHR* <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956&LangID=E>> (accessed 12-11-2018).

⁴² The World Professional Association for Transgender Health Standards of Care for the Health of Transsexual, Transgender, and Gender Non-conforming People 7th version WPATH.

⁴³ Currie & De Waal *The Bill of Rights Handbook* 601.

closely linked to the child's age.⁴⁴ However, arguing that children under a certain age are generally too young to be aware of their gender identity can disregard the best interests of the child principle guaranteed in section 28 of the Constitution and Article 3 of the UNCRC.⁴⁵ In *S v M* Sachs J explained that:

“[E]very child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them”.⁴⁶

In terms of international and regional standards and the constitutional framework, all individuals should have the right to self-identify.⁴⁷ This has the potential to ensure that neither the law nor the legislative framework impose discriminatory prerequisites on transgender children who seek to alter their sex descriptors in a manner consistent with their rights to dignity and identity.⁴⁸ Legal documents reflecting children's gender identity lower the risk of exposing their biological sex or previous names, while protecting transgender children from exclusion and discrimination.⁴⁹ Studies further suggest that gender identity recognition procedures can assist in reducing the abovementioned difficulties.⁵⁰ In giving effect to international and regional standards, many foreign jurisdictions, such as Argentina and Malta have legislative provisions in place that provides children access to legal gender recognition mechanisms based on self-determination.⁵¹

The international legal framework has implemented substantial steps to ensure protection against gender-based violence in society; however, the international response to human rights violations based on sexual orientation and gender identity

⁴⁴ 601. See also S Human “The Theory of Children's Rights” in T Boezaart (ed) *Child Law in South Africa* (2009) 243–249.

⁴⁵ Henzel (2016) *Humboldt Law Clinic* 15.

⁴⁶ Currie & De Waal *The Bill of Rights Handbook* 601. See also *S v M* 2008 3 SA 232 (CC) para 18.

⁴⁷ See headings 3 4 5 and Chapter 6 and 7 below.

⁴⁸ Legal Resource Centre et al “Recognition of Civil and Political Rights: A continued struggle for Transgender and Intersex Persons in South Africa: An Alternative Report to the United Nations Human Rights Committee” (2016) *tbinternet.ohchr.org* <<https://bit.ly/2XfAp8y>> 9.

⁴⁹ Henzel (2016) *Humboldt Law Clinic* 13. Using the previous assigned name results in dead-naming transgender individuals. Dead-naming is when a person uses the old name of a transgender individual intentionally.

⁵⁰ Olsen et al (2016) *Pediatrics* 1–8.

⁵¹ See headings 3 4 5, 4 3 and 4 4 below.

has been inconsistent and fragmented.⁵² In terms of the Constitution, the South African legal framework should evolve in accordance with international law and internationally recognised human rights.⁵³ In this regard, section 39 and 231 to 233 of the Constitution aims to achieve harmony between the South African and international legal frameworks. Section 39 calls for a consideration of international law when interpreting the Bill of Rights and holds that when interpreting the Bill of Rights, it must be guided by international norms and the interpretation thereof by international courts and other institutions.⁵⁴ Furthermore, section 231(4) states that any international law becomes binding law when it is enacted or ratified into law by national law.⁵⁵ The obligation to consider the international law is further echoed under section 233 of the Constitution, which states that courts must prefer any reasonable interpretation of the national legislative framework that is consistent with international law.

Despite these constitutional provisions, human rights violations against transgender children are still occurring in South Africa.⁵⁶ To reiterate, research shows that transphobia leaves young transgender individuals vulnerable to mental health problems, such as depression and increases the rates of suicide and self-harm.⁵⁷ Van Vollenhoven and Els argue that, unless values underpin the legal system, the law would remain unenforceable and, subsequently, people's rights would continue to be infringed.⁵⁸ In this context, Henzel argues that transgender children should be recognised as a vulnerable group in society and States should, therefore, take special

⁵² This could be due to a Member States' inconsistency with applying or implementing rights in accordance to their Constitution or international laws such as the UNCRC. See the preamble of the Yogyakarta Principles in Annexure A of this thesis.

⁵³ See sections 39(1) and 233 of the Constitution. See also J Dugard "International Law and the South African Constitution" (1997) *EJIL* 77 92.

⁵⁴ 85.

⁵⁵ See heading 3 4 1 for a detailed discussion on the application of international law in relation to this thesis.

⁵⁶ Van Vollenhoven & Els (2013) *De Jure* 266.

⁵⁷ Council of Europe "Equal opportunities for all children: Non-discrimination of lesbian, gay, bisexual, transgender and intersex (LGBTI) children and young people" (2016) *rm.coe.int* <<https://rm.coe.int/16806a8d8f>> 17.

⁵⁸ Van Vollenhoven & Els (2013) *De Jure* 265. Section 1 of the South African Constitution highlights: "The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness". See also p 5 above of this thesis that refers to these founding values.

measures to reduce discrimination and violence against them, as well as combat stigmas attached to being transgender.⁵⁹

Against this background, the question arises if there is a duty on South Africa to recognise a right to legal gender recognition for children regardless of their age or other preconditions such as having one's sexual characteristics medically or surgically altered before accessing legal gender recognition. This question must be considered against the backdrop of children's rights under international law and the national legal framework.

1 3 Research question

The research question that this thesis will address is whether the right to legal gender recognition is accessible to transgender children in South Africa. To answer this question, it first needs to be established if such a right exists. Subsequently, the rights of transgender children, as espoused in international and regional law, as well as their rights in terms of the Constitution and legislative framework of South Africa, must be determined. If it is found that the right to legal gender recognition for transgender children does exist, it needs to be established to what extent this right is accessible in South Africa.

1 4 Value and underlying assumptions

The rights of transgender children have received increased attention from the Committee.⁶⁰ The Committee has emphasised that the primary responsibility of the protection of transgender children's rights lies with Member States and explained it in the following terms:

"We call on States to comply with their obligation to respect, protect and fulfil the rights of all children and young adults without discrimination, to ensure that lesbian, gay, bisexual, transgender and intersex children and young people are consulted and participate in discussions on policies and laws that impact on their rights. We also call on human rights

⁵⁹ Henzel (2016) *Humboldt Law Clinic* 20.

⁶⁰ K Sandberg "The Rights of LGBTI Children under the Convention on the Rights of the Child" (2015) 33 *Nordic Journal of Human Rights* 337 338.

and child rights institutions to fulfil their mandate and play their part in protecting them from violence and discrimination”.⁶¹

The underlying assumption of this thesis is that the South African implementation of recognising the right to legal gender recognition for transgender children fails to give effect to transgender children’s rights in terms of international law, regional law and the South African Constitution. It is envisaged that this thesis will recommend that South Africa should take further steps to accommodate the rights of transgender children by recognising a right to legal gender recognition based on their self-determination. Such a recommendation would require radical change within and from the current legal framework. This will assist to overcome inconsistencies with the Constitution and international law. All measures to protect transgender children should be applied in a manner that truly is in the best interests of children.⁶² Thus, in all matters concerning the legal gender recognition decisions concerning the transgender child, progressive legislation needs to include the best interests of the child as its core principle.⁶³ Considering the standard set by international law, best practices adopted by foreign jurisdictions and the national legal framework, the value of this thesis is that it will seek to provide practical recommendations as to how the South African legal framework could, and arguably should, develop and implement legal gender recognition procedures for transgender children.

1 5 Research aim and methodology

The aim of this thesis is to establish whether there is a right to legal gender recognition for transgender children in South Africa, and if so to what extent it is accessible the relevant children. In order to establish such a right, this thesis will first establish if there is a right to gender identity for transgender children in terms of the international law. In terms of Article 39(1)(b) and 233 of the Constitution, an interpretation of the Bill of Rights and legislation should be consistent with the international law. Therefore, the

⁶¹ UN Human Rights Office of the High Commissioner “Joint statement Discriminated and made vulnerable: Young LGBT and intersex people need recognition and protection of their rights by the Committee and other UN and regional bodies for the International Day against Homophobia, Biphobia and Transphobia” (2015) *OHCHR* <<https://bit.ly/2W3x5Mo>> (accessed 04-05-2017).

⁶² UNICEF “Eliminating Discrimination Against Children and Parents Based on Sexual Orientation And/ Or Gender Identity” No. 9, UNICEF, New York, November 2014 www.unicef.org <<https://uni.cf/2npsbuM>> (accessed 04-05-2017).

⁶³ 15.

international law will be evaluated with the aim of determining if South Africa gives effect to their commitment to the international law. Secondly, certain observations from foreign jurisdictions could prove to be useful due to the following reasons: In 2012, Argentina became the first country to implement a right to legal gender recognition based on self-determination. Inspired, by Argentina, in 2014, Malta became the first country in Europe to do the same. Both regimes for legal gender recognition provides the right to children, without having any age requirements in place to obtain legal gender recognition. Prior to these amendments, Argentinian, and Maltese legislation, like most other countries – including South Africa, required individuals to undergo sterilisation and surgical procedures before accessing any form of legal gender recognition. The South African legal framework follows a combination of treatment and assessment models for legal gender recognition. In this regard, an analysis of the Inter-American and European approaches to legal gender recognition would add useful persuasive value based on the fact that the sources of law are all anchored in the Universal Declaration of Human Rights.

In order to establish a right to legal gender recognition for transgender children in South Africa, this thesis will analyse and compare the position in South Africa with the international and regional legal framework and the position in foreign jurisdictions, such as Argentina, Malta and Ireland. This will be done by analysing and interpreting relevant constitutional provisions, legislation, case law, reports, advisory opinions, international law and regional law. Throughout the thesis, suggestions will be made as to how South Africa could improve the accessibility of the right to legal gender recognition for transgender children.

1 6 Limitations

It is important to note that this thesis primarily concerns an analysis of transgender children's right to legal gender recognition. Therefore, gender and gender identity form the premise for the discussion. It is, however, necessary to evaluate, for background and argumentative purposes, terms such as sex, sexual orientation, and intersex. The rationale behind the inclusion of these terms, will be to highlight the existing conflation within the legal framework, which has the effect of violating fundamental human rights and capabilities such as accessing recognition in terms of the law. Furthermore, reference to the term LGBTQI will be made to the extent that it is referred to in

particular documents. Thus, this thesis is in no way advocating for the inclusion of transgender under the acronym. This stems from the recent concerns that have been raised from parts of the transgender community who believes transgender should not fall under the umbrella of LGBTQI. This thesis acknowledges the concerns, but a discussion on this topic does, however, fall beyond the scope of this analysis.

1 7 Overview of chapters

Chapter 2 will provide definitions for terms such as, *sex* and *sexuality*, followed by *gender* and *gender identity*, with the aim of highlighting the difference between the terminology. This chapter will also explore the development of gender identity in children. Thereafter, certain medical terminology and requirements for gender dysphoria will be explained. This chapter will also determine the scope of social transitioning for transgender individuals. Chapter 3, in turn, will provide a brief discussion of child law and the development and theory of children's rights. An analysis of global international and regional documents, instruments and standards relating to children's rights and the development thereof, will follow. This will be done to illustrate the current international and regional protection guaranteed to transgender children, which will be further substantiated by general comments and recommendations from international committees and courts. Furthermore, the Inter-American and European perspective on legal gender recognition will be scrutinised by examining how the selected jurisdictions apply the different models for legal gender recognition and how it accords with the international legal framework. Based on the findings of Chapter 3, Chapter 4 will explain the models employed in different foreign jurisdictions which are used to achieve legal gender recognition. The models are the assessment model, the treatment model, and the self-determination model. An analysis of the different models will aim to suggest what is considered the best practice as set out by the international law.

Chapter 5 will provide an overview of the South African constitutional- and legislative framework that governs the rights of transgender children. The relevant constitutional rights pertaining to the promotion and protection of transgender children's rights include the right to equality, human dignity, freedom, and the best interests of the child. Hereafter, the impact of the PEPUA, the Children's Act and the Alteration Act will be examined to determine the scope of transgender children's rights

in terms of the mentioned acts. Considering the background and findings provided in the previous chapters, Chapter 6 will determine if transgender children do indeed have a right to legal gender recognition in South Africa. The purpose of this Chapter is to establish whether the underlying assumption of this thesis is in fact correct. Chapter 7 will provide practical recommendations as to how the process of access to legal gender recognition for transgender children should be realised and implemented in terms of the South African legal framework.

CHAPTER 2: CONCEPTUALISING SEX, GENDER AND TRANSGENDER CHILDREN

2 1 Introduction

Blakemore et al point to the fact that many people believe that sexual and gender development only becomes important at the onset of puberty and that all aspects of gender and sex are consistent.¹ These people may assume that an individual is definitely female or male, homosexual or heterosexual, masculine or feminine. However, these qualities are much more complex than they might appear at first glance.²

Sex and *gender* are widely regarded as one of the fundamental ways in which the social life of a human being is constructed. When a child is born, one of the first questions usually asked, is what the sex of the child is. There are only a few factors that influence the lives of people from birth to death as much as their gender or sex.³ The sex observed at birth and the *gender* assigned thereto influences from the most trivial to the most profound aspects of a human being's life. It determines the name a child is given at birth, the colour of a child's clothing, the way a child is addressed, and the objects and toys with which a child will be provided. Once a child grows up, gender and sex continue to play a significant role.⁴ Sex and gender are terms that are frequently used interchangeably, and this fact leads to a conflation in terminology. However, psychologists and most social scientists view sex and gender as conceptually distinct terms.⁵

This chapter provides an outline of the study of sex and gender. *Sex* and *sexuality* will first be defined, followed by *gender* and *gender identity*. The discussion in this chapter aims to highlight the difference between the terminology and the conflation between these concepts. Thereafter, gender development in children will be examined. The chapter will then scrutinise the distinction between medical transition and social transition. The chapter will aim to provide background to the arguments raised throughout this thesis, especially in relation to the conflation of concepts in the

¹ Blakemore et al *Gender Development* 2 ed (2008) 2.

² 2.

³ 1.

⁴ 1.

⁵ W Little "Gender, Sex, and Sexuality" in W Little & R McGivern (eds) *Introduction to Sociology* (2013) 368.

legislative framework and the possible human rights violations of requiring medical preconditions in order to access legal gender recognition.

2 2 The difference between sex and gender

2 2 1 Sex and sexual orientation

The process of assessing a person's sex might seem obvious and automatic. As early as two months, children start to categorise people into two groups: larger individuals with deeper voices and rougher skin go into one category, while smaller individuals with higher-pitched voices and softer skin go into another. Even though the process of ascertaining sex and gender might appear obvious and automatic, it is not. In the context of a medical perspective, Money identifies eight elements of sex and *gender*. These are: chromosomal sex; antigenic sex; gonadal sex; prenatal hormonal sex; internal morphologic sex; external morphologic sex; pubertal hormonal sex; and assigned sex, which is sex of rearing and the usual basis for gender identity.⁶ Sex can also further be divided into biological sex and sexual behaviour. Stoller connotes genitalia, gonads, hormones, and chromosomes to *biological sex*, whereas *sexual behaviour* – which includes sexual orientation, are largely, but not exclusively, defined by these biological elements.⁷

Prior to the 1970s, the term sex, that is, biological sex, was most commonly used to refer to being male or female. Sex refers to the physical and/or psychological differences between males and females, which includes both primary sex characteristics and secondary sex characteristics.⁸ *Primary sex characteristics* refer to sexual characteristics that are exposed at birth and it includes reproductive organs and sexual chromosomes. *Secondary sex characteristics* are those that appear after puberty, such as the growth of breasts, facial hair, height, and muscularity.⁹

⁶ Valdes *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "sex," "gender," and "sexual Orientation" in Euro-American Law and Society* (1994) 20.

⁷ According to Stoller, gender behaviour also plays an essential part in sexual behaviour. See Stoller *Sex and Gender: The Development of Masculinity and Femininity* (1984).

⁸ Little "Gender, Sex, and Sexuality" in *Introduction to Sociology* 368–369.

⁹ JJ Macionis & K Plummer *Sociology: A Global introduction* (2012) ch 12. See also Little "Gender, Sex, and Sexuality" in *Introduction to Sociology* 372. See further, American Psychological Association "Guidelines for psychological practice with lesbian, gay, and bisexual clients" (2012) 67 *Am Psychol* 10–42.

Sex is typically assigned at birth based on the appearance of the child's external genitalia or the internal genitalia when the external genitalia are ambiguous.¹⁰ The DSM-5 defines sex as the biological indication of being male and female, understood in the context of reproductive capacity and external genitalia.¹¹ The APA defines sex as an individual's biological status, typically categorised as female, male, or intersex.¹² Previously termed hermaphroditism, *intersex* is described as a condition where individuals are born with conflicting or ambiguous biological indicators and characteristics of sex.¹³ An intersex individual's sexual or reproductive anatomy does not align with the "typical" bodily characteristics of female or male. Other ways of describing *intersex* are when an individual has genitals that seem to be "in-between" the usual female and male types.¹⁴ However, the condition is not always easily noticeable. For example, an individual might be born with external genitalia that conforms to the criterion of being either male or female, but their internal reproductive anatomy consists of inconsistent or conflicting compositions.¹⁵ Even though *intersexism* is generally described as an inborn condition affected by biological sex indicators, it does not always manifest itself at birth. In some cases, individuals will only notice their intersex anatomy when they reach puberty. Some individuals live and die without ever being aware of their condition.¹⁶

Apart from sex being a biological indicator as illustrated above, it further holds an identity or behavioural component commonly known as *sexual orientation* and *sexual identity*. *Sexual identity* refers to how individuals identify themselves as being homosexual, heterosexual, or bisexual.¹⁷ The Yogyakarta Principles define *sexual orientation* as:

¹⁰ American Psychological Association "Guidelines for psychological practice with transgender and gender nonconforming people" (2015) 70 *Am Psychol* 832–864.

¹¹ American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 829.

¹² American Psychological Association (2012) *Am Psychol* 10–42.

¹³ American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 824. See also Cortez et al "Gender: pathways and dialogues between feminist and biomedical studies from the 1950s to 1970s" (2019) 29(1) *Physis: Revista de Saúde Coletiva*, Rio de Janeiro 4.

¹⁴ Intersex Society of North America "What is intersex?" (2008) www.isna.org

¹⁵ Intersex Society of North America "What is intersex?" (2008) www.isna.org <http://www.isna.org/faq/what_is_intersex> (accessed 01-02-2019). See Money Gay, *Straight and In-between: The Sexology of Erotic Orientation* (1988) 29.

¹⁶ Intersex Society of North America "What is intersex?" www.isna.org.

¹⁷ Blakemore et al *Gender Development* 6.

“[E]ach person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender”.¹⁸

Therefore, *sexual orientation* denotes feelings of arousal or sexual attraction towards people of the same sex, opposite sex, or all sexes.¹⁹ For many years it was believed that differences in *sexual orientation* was influenced by different socialisation or familial experiences. However, it has constantly been demonstrated by research that family backgrounds and experiences have no influence on one’s sexual orientation.²⁰ Evident from research is the fact that *sexual orientation* holds a biological component. Therefore, it is important to note that *sexual orientation* does not involve preference.²¹ Money describes it as “something that happens – an example of the way things are”, like being left-handed or right-handed, tall or short. Sexual orientation is a relatively stable characteristic of a person that cannot be changed.²² Further, Money argues, and rightfully so, that to misconstrue *sexual orientation* as a voluntary choice, implies that one can legally be forced, under threat of punishment, to choose to be heterosexual.²³

2 2 2 Gender and gender identity

In a journal article published by Bentley in 1945, the term *gender* was used to describe the “socialised observations of sex”. Tapping into this understanding in the early 1950’s, Money coined the term *gender role*, to refer to the subjective identity of an individual.²⁴ According to Money, the term emerged out of the need to distinguish between the role and behaviours of male and female that is independent of biological characteristics.²⁵ He defines *gender roles* as:

“[A]ll those things that a person says or does to disclose himself or herself as having the status of boy or man, girl or woman, respectively. It includes, but is not restricted to,

¹⁸ See the preamble of the Yogyakarta Principles as included in Annexure A of this thesis.

¹⁹ American Psychological Association (2012) *Am Psychol* 832–864.

²⁰ Introduction to psychology “Sexual Behaviour” (2018) *lumenlearning.com* <<https://courses.lumenlearning.com/wmopen-psychology/chapter/introduction-to-sexual-behavior/>> (accessed 19-08-2019).

²¹ Money Gay, *Straight and In-between: The Sexology of Erotic Orientation* 11.

²² Introduction to psychology “Sexual Behaviour” (2018) *lumenlearning.com*.

²³ Money Gay, *Straight and In-between: The Sexology of Erotic Orientation* 11.

²⁴ Cortez et al (2019) 29(1) *Physis: Revista de Saúde Coletiva*, Rio de Janeiro 3, 7-8.

²⁵ Cortez et al (2019) 29(1) *Physis: Revista de Saúde Coletiva*, Rio de Janeiro 3. See also Mealey Sex Differences: *Developmental and Evolutionary Strategies* (2000) 12.

sexuality in the sense of eroticism. Gender role is assessed in relation to general mannerisms, behaviors [sic] and attitudes; preference in games and games and recreational interests; spontaneous themes of conversation, content of dreams, ramblings and fantasies; response to oblique surveys and projective tests; evidence of erotic practices and, finally, the person's own responses when asked."²⁶

Therefore, the term *gender roles* differentiates between different aspects of being female or male.²⁷ *Gender roles* refer to the societal concept of how men and women are typically expected to act and behave, and rely on norms or standards created by society.²⁸ Similarly, the APA defines *gender* as an accepted notion from a given culture's perception of the feelings, attitudes, and behaviours associated with being female or male. Thus, it is observed as the condition of being male or female.²⁹ In children, "society is quick to outfit boys in blue and girls in pink".³⁰ Children are exposed to these societal norms through play: boys will generally be provided with masculine toys like trucks and toy guns that foster motor skills, aggression, and solitary play; while girls are given dolls and dress-up apparel that promotes nurturing skills and role play.³¹

In 1968, Stoller moved beyond Money's conceptualisation of *gender* as norms and standards created by society, and expanded the concept of *gender* to encapsulate an "awareness of belonging to one or the other biological sex".³² Inspired by Stoller, in 1973, Money expanded the concept of gender to include a dual nature: first being the above mentioned gender role and secondly, an identity component, which he defined as the subjective female or male identity and its forms of public expression.³³ According to Money, gender role and gender identity were "two sides of the same coin", however, gender identity is more comprehensive than gender role, since it includes

²⁶ Money, Hampson & Hampson "An examination of some basic concepts: the evidence of human hermaphroditism" (1955) 97(4) *Bull Johns Hopkins Hosp* 301–319. See also Mealey *Sex Differences: Developmental and Evolutionary Strategies* 12.

²⁷ J Money "Gender Role, Gender Identity, Core Gender Identity: Usage and Definition of Terms" (1973) 1 *Journal of the American Academy of Psychoanalysis* 397–402.

²⁸ Little "Gender, Sex, and Sexuality" in *Introduction to Sociology* 372–373.

²⁹ American Psychological Association "Guidelines for psychological practice with lesbian, gay, and bisexual clients" 10–42. See also American Psychological Association *APA dictionary of psychology* (2015).

³⁰ Little "Gender, Sex, and Sexuality" in *Introduction to Sociology* 372.

³¹ 372–373.

³² Cortez et al (2019) 29(1) *Physis: Revista de Saúde Coletiva*, Rio de Janeiro 6.

³³ Cortez et al (2019) 29(1) *Physis: Revista de Saúde Coletiva*, Rio de Janeiro 7.

“ideation, imagery, and unvoiced thought” of an individual.³⁴ *Gender identity* is, therefore, the private experience of one’s gender role, and *gender role* is the public manifestation of gender identity.³⁵

Later, Money narrowed the term *gender* to refer to external and internal components of gender, where *external components of gender* refer to gender roles and *internal components* refer to gender identity.³⁶ The term *identity* derives from the Latin noun *identitas*, which means “the same”. *Identity* refers to one’s mental image of one’s self, implying a degree of sameness with others in a certain way.³⁷ Therefore, *gender identity* refers to an individual’s own concept of being a man, woman, or another category based on their association or understanding of feminine and masculine gender roles.³⁸ The Yogyakarta Principles state that:

“Gender identity is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms”.³⁹

Furthermore, according to the DSM-5, the term *gender* was first used with the realisation that individuals with conflicting or ambiguous biological indicators of sex could not uniformly associate with their biological sex. It further stems from the fact that some individuals develop an identity as male or female, which differs from their biological sex.⁴⁰ Therefore, individuals who identify with a gender opposite to their biological sex, are transgender.

³⁴ Money Gay, *Straight and In-between: The Sexology of Erotic Orientation* 201 - 202. Cortez et al (2019) 29(1) *Physis: Revista de Saúde Coletiva*, Rio de Janeiro 7.

³⁵ Money Gay, *Straight and In-between: The Sexology of Erotic Orientation* 201 – 202.

³⁶ Blakemore et al *Gender Development* 3. See also Money (1973) *Journal of the American Academy of Psychoanalysis* 397–402.

³⁷ TD Steensma, BP Kreukels, AL de Vries & PT Cohen-Kettenis "Gender identity development in adolescence" (2013) 64 *Horm Behav* 289.

³⁸ Little “Gender, Sex, and Sexuality” in *Introduction to Sociology* 372.

³⁹ See the preamble of the Yogyakarta Principles as included in Annexure A of this thesis.

⁴⁰ American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 451.

2 2 2 1 Transgender and transsexual

The term *transgender* originated in the 1980s.⁴¹ The DSM-5 describes the term *transgender* as a “broad spectrum of individuals” who transiently or perpetually identify with a gender that is different from their assigned gender.⁴² The APA defines *transgender* as an adjective that is an umbrella term used to describe a wide range of differences in gender identity and/or gender roles.⁴³ It includes, but is not limited to, trans, transgender and transsexual individuals.

Transgender refers to individuals who do not perceive their gender to be congruent to their expected societal gender role in accordance with the sex assigned to them at birth.⁴⁴ It includes any individual going against the socially constructed stereotypical norms of their assigned gender. *Transsexual* is a term used to describe transgender individuals who have changed or those who are in the transition phase of changing their body through the use of medical (or surgical) interventions which will enable them to better align their bodies with a gender identity that suits their preferred gender.⁴⁵ The World Health Organisation (“WHO”) describes *transsexualism* as a medical diagnosis in the *International Classification of Diseases* (“ICD-10”). It is identified as a desire to be a member of the opposite sex, usually accompanied by a sense of uneasiness with the individual’s assigned gender.⁴⁶ According to the DSM-5, a

⁴¹ J Wood “Being Transgender today” (2015) *Infoplease.com*

<<https://www.infoplease.com/us/education/being-transgender-today>> (accessed 09-07-2017).

⁴² American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 451.

⁴³ It could include, for example, people described as drag queens, drag kings, queers, gender queers, intersexual, fem queens, girls, boys, trannies, trans, feminine gay men, butch lesbians, male-to-female, female-to-male, cross-dressers, pre-op or post-op transsexuals. See American Psychological Association “Guidelines for Psychological Practice with Transgender and Gender Nonconforming People” (2015) 70 *American Psychologist* 832 862.

⁴⁴ DA Gonzalez-Salzberg Sexuality and Transexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law (2019) 29.

⁴⁵ Transitioning involves a process through which individuals progress when they shift towards a gender identity that differs from the gender assigned to them at birth. According to American Psychological Association “Guidelines for Psychological Practice with Transgender and Gender Nonconforming People” (2015) 70(9) *American Psychologist* 832 863:

“The length, scope, and process of transition are unique to each person’s life situation. For many people, this involves developing a gender role and expression that is more aligned with their gender identity. A transition typically occurs over a period of time; TGNC (Transgender and Gender Non-Conforming) people may proceed through a social transition (e.g., changes in gender expression, gender role, name, pronoun, and gender marker) and/or a medical transition (e.g., hormone therapy, surgery, and/or other interventions)”.

See also Money Gay, *Straight and In-between: The Sexology of Erotic Orientation* 228.

⁴⁶ World Health Organization *International statistical classification of diseases and related health problems* 2 5 ed (RS 10 2016) F64.0. See also, World Health Organization *International statistical classification of diseases and related health problems* (RS 11 2018) ch 17 HA61 available at: <<https://icd.who.int/browse11/l-m/en#/http%3a%2f%2fid.who.int%2fid%2fentity%2f344733949>> (accessed 19-06-2018).

transsexual individual seeks to or has undergone a transition from being male to female or female to male.⁴⁷ This transition could also involve a bodily transition using hormone treatment or sex reassignment surgery.⁴⁸

However, the concept of *gender* has many components. For example, *assigned gender* or *natal gender* describes an individual's initial gender assignment at birth (that is, as male or female), solely based on their biological sex.⁴⁹ *Gender atypical* refers to behavioural features that is not typically associated with the behaviour expected from the individual's assigned gender in a given society.⁵⁰ *Gender queer* or *gender fluid* entails embracing different gender identities at different times.⁵¹ *Agendered* refers to individuals who have no gender whereas a *cisgender* individual's gender identity aligns with their gender assigned at birth.⁵² *Gender reassignment* refers to the process of undergoing a medical transition.⁵³

2 2 3 The conflation between sex and gender and the law

In the 1970s, feminist theories started challenging normative conceptions, and it became common within feminism(s) to distinguish between sex and gender.⁵⁴ However, the terms sex, gender, sexual orientation and gender identity are often conflated, which is largely due to stereotypical attitudes that exists about homosexuality and the need to promote heterosexuality.⁵⁵ To reiterate, sex refers to biological attributes and behavioural characteristics, while *gender* refers to behavioural social constructs of male, and females and the subjective identity component, that is gender identity. Therefore, *gender identity* refers to one's

⁴⁷ American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 451.

⁴⁸ 451.

⁴⁹ American Psychological Association "Definitions Related to Sexual Orientation and Gender Diversity in APA Documents" (2015) APA <<https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf>> (accessed 13-08-2019). See also American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 822.

⁵⁰ American Psychological Association "Definitions Related to Sexual Orientation and Gender Diversity in APA Documents" APA.

⁵¹ American Psychological Association "Definitions Related to Sexual Orientation and Gender Diversity in APA Documents" APA.

⁵² American Psychological Association "Definitions Related to Sexual Orientation and Gender Diversity in APA Documents" APA.

⁵³ American Psychological Association "Definitions Related to Sexual Orientation and Gender Diversity in APA Documents" APA. See also American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 822.

⁵⁴ Gonzalez-Salzberg *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law* 14.

⁵⁵ Introduction to psychology "Sexual Behaviour" (2018) lumenlearning.com.

subjective sense of being male, female, or however they wish to identify, whereas *sexual orientation* refers to an emotional and erotic attraction to individuals of the same-sex, opposite sex, or both.

According to Valdes, sex is conflated with gender by deriving a feminine and masculine gender from the female or male primary sex characteristic. While, gender and sexual orientation are conflated by associating a butch or effeminate gender with sexual orientation. For example, a woman who does not conform to the socially constructed notion of the “feminine” gender is labelled as lesbian. Further, sex and sexual orientation are conflated by deriving a sexual orientation from observing the sex of the members of a coupling – members are considered gay if the coupling consists of individuals of the same sex.⁵⁶ It is evident that these conflation stems from the existing social structures of heteronormativity. Valdes attributes the conflation to, what he calls, the heteropatriarchy, which consist of heterosexist and androsexist values that holds the ideological supremacy in society in the sense that it dominates the societal notion of sex, gender and sexual orientation.⁵⁷ Therefore, the conflation reflects, projects and protects the heteropatriarchy.⁵⁸ This patriarchal gaze and conflation is observed, not only from society, but also in the law, which has the effect of undermining the laws ability to apply effectively and devise rules against the strains of bigotry.⁵⁹ Valdes argues that the conflation in the legal system can be harmful to the nation in multiple ways.⁶⁰ It can be harmful to the individual that relies on the law to seek justice or even recognition. Important for this thesis, as will be discussed below, is the fact that the conflation between sex and gender is evident within the South African legal framework, which can affect fundamental human rights and access to having one’s gender legally recognised.⁶¹

The following section will conceptualise gender identity and the development thereof in pre-pubertal children.

⁵⁶ Valdes *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "sex," "gender," and "sexual Orientation" in Euro-American Law and Society* 259. See also Bernard-Naude “Sexual Orientation discrimination is never just that” (2016) Mail & Guardian <<https://thoughtleader.co.za/jacobarnardnaude/2016/11/07/sexual-orientation-discrimination-is-never-just-that/>> (accessed 28-12-2019).

⁵⁷ Valdes *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "sex," "gender," and "sexual Orientation" in Euro-American Law and Society* 23.

⁵⁸ 23.

⁵⁹ 23.

⁶⁰ 23-24.

⁶¹ See headings 5 2 2 1, 5 3 5, 6 3 and 7 2.

2.3 Gender identity development in children

Gender plays a fundamental role in an individual's identity and the assignment thereof has significant psychological implications throughout life.⁶² To reiterate, in children, gender identity is associated with them being able to confidently answer the question: "are you a boy or a girl?". As mentioned above, research suggests that most children can answer this question by the age of 2.⁶³

In 1966, Kohlberg developed a classic stage theory of gender development that suggests that from the age of 2 years, children can correctly identify their gender as either boy or girl. At the age of 3 to 7, they understand that their sex remains stable and it is an important part of their identity. Here, children learn that girls grow up to be women and boys grow up to be men. At the age of 7 to 12, children understand that their gender is constant and independent of external features.⁶⁴ Kohlberg's classic stage theory states that a child's development relies heavily upon the cognitive aspect thereof.⁶⁵

A number of years later in 2001, Egan and Perry defined *gender identity* as a "multidimensional construct" that comprises of the person's knowledge of fitting into a gender category and an experienced capability and conformant with the preferred gender category.⁶⁶ Egan and Perry are of the view that a conception of gender identity not only involves the child's knowledge (cognitive aspect) and beliefs pertaining to their own gender, but also includes gender norms. Egan and Perry's understanding of the term *gender identity* encompasses and extends beyond Kohlberg's original definition of the term. Egan and Perry propose five components of gender identity. These include: "membership knowledge", which entails an individual's knowledge of their own gender; "gender typical", which manifests in the way the individual perceives their behavioural traits as similar to others in the same gender group; "gender contentedness", which relates to the satisfaction experienced by an individual with their natal gender; "felt pressure", that is the level of pressure an individual feels from

⁶² Katz-Wise et al (2017) *Int J Transgend* 1434–1599 1434. See also Egan & Perry "Gender identity: a multidimensional analysis with implications for psychosocial adjustment" (2001) 37 *Dev Psychol* 451–463.

⁶³ Blakemore et al *Gender Development* 5. See heading 1.1 above.

⁶⁴ LA Kohlberg "A cognitive-developmental analysis of children's sex-role concepts and attitudes" in EC Maccoby (ed) *The development of sex differences* (1966) 82–173.

⁶⁵ Franklin *Gender* 86.

⁶⁶ Egan & Perry (2001) *Dev Psychol* 451–463.

them self or others to conform to the gender assigned to them at birth; and “intergroup bias”, which is the belief that the sex group the individual belongs to is superior to the other sex group.⁶⁷ Egan and Perry’s description of gender identity suggests that they view it as a reflective, cognitive, self-conscious and emotion-laden construct.⁶⁸ Therefore, the development of gender identity spans across physical, social, cognitive, and emotional developmental dimensions.⁶⁹

Developmental studies indicate that personal identity is formed during the period of childhood. Personal identity includes an individual’s principles, values, and the roles they adopt.⁷⁰ Cognitive developmental studies found that children learn about gender at an early stage. It is also widely accepted as a gradual process which entails many stages throughout the years.⁷¹ Most children develop the ability to label their own and others’ genders between 18 and 24 months.⁷² Children develop a clear understanding of their gender by the age of 2 or 3 and start to categorise different information regarding gender roles. During this period, gender-typical behaviour increases whereby interactions with their parents, family, friends, and the media can play a significant role. It is during this period that gender variant children start displaying gender non-conforming behaviour, especially seen in their behaviour in bathrooms and in the clothing and toys they prefer.⁷³ Children gain a stronger awareness of their gender identity and gender stereotypes between the ages of 5 and 7. However, gender stereotypes establish, and limits behaviour and makes it difficult for gender variant children to express their preferred gender.⁷⁴

An issue that relates to gender identity, concerns an individual’s sense of comfort with the gender category assigned to them at birth.⁷⁵ For most children, gender identity is largely congruent with their sex role.⁷⁶ There are, however, individuals who cannot

⁶⁷ Blakemore et al *Gender Development* 242.

⁶⁸ 242.

⁶⁹ A Oswalt "Early Childhood Gender Identity And Sexuality" (30-07-2016) *mentalhelp.net* <<https://www.mentalhelp.net/articles/early-childhood-gender-identity-and-sexuality/>> (accessed 01-07-2017).

⁷⁰ Steensma et al (2013) *Horm Behav* 290.

⁷¹ 290.

⁷² 290.

⁷³ SA Brill & R Pepper *The Transgender Child: A Handbook for Family and Professionals* (2008).

⁷⁴ LB Blume & MJ Zembar *Middle childhood to middle adolescence: development from ages 8 to 18* (2007) 34.

⁷⁵ Blakemore et al *Gender Development* 6.

⁷⁶ According to American Psychological Association *APA dictionary of psychology* 2 ed (2015), the term sex role refers to:

or do not conform to their assigned gender and experience an unease with such gender.⁷⁷

2.4 Gender dysphoria

Gender dysphoria is the discomfort and/or distress that an individual experiences when their biological sex and assigned gender identity do not align.⁷⁸ Individuals diagnosed with gender dysphoria experience a conflict between their assigned or physical gender and the gender with which they identify. This experienced conflict may be accompanied by a feeling of unease with their assigned gender or the expected stereotypical roles of their assigned gender, which particularly develops during, or prior to, puberty.⁷⁹ The effect of this gender conflict can manifest in different ways. Gender conflict can change the way in which the individual wants to express their gender while influencing their way of dressing, behaviour, and the way they feel and think of themselves.⁸⁰

The APA defines *gender dysphoria* as an incongruence between an individual's gender identity, sex assigned at birth, gender identity and expected roles and characteristics assigned to their natal gender.⁸¹ The DSM-5 describes *gender dysphoria* as a general descriptive term that refers to an individual's discontent with their assigned gender. The current description differs from the previous definition of gender identity disorder in the fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-4"). The current term used by the DSM-5 is, however, more descriptive and shifts a clinical emphasis to a focus on the distress that may occur due

"the behaviour and attitudinal patterns characteristically associated with being male or female as defined in a given society. Sex roles thus reflect the interaction between biological heritage and the pressures of socialization, and individuals differ greatly in the extent to which they manifest typical sex-role behaviours".

The terms *sex role* and *gender roles* are commonly used interchangeably to denote "the behaviour and attitudinal patterns characteristically associated with being male or female as defined in a given society". See also Steensma et al (2013) *Horm Behav* 290. See further, A Eagly et al "Social role theory of sex differences and similarities: A current appraisal" in T Eckes & HM Trautner (eds) *The developmental social psychology of gender* (2000) 123.

⁷⁷ Steensma et al (2013) *Horm Behav* 290.

⁷⁸ SR Atkinson & D Russell "Gender dysphoria" (2015) 44 *Australian Family Physician* 792–796.

⁷⁹ American Psychiatric Association "What is Gender Dysphoria" (2016) www.psychiatry.org <<https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>> (accessed 08-07-2017).

⁸⁰ American Psychiatric Association "What is Gender Dysphoria" www.psychiatry.org.

⁸¹ American Psychiatric Association "What is Gender Dysphoria" www.psychiatry.org.

to the sense of incongruence between the individual's assigned and preferred gender.⁸²

The WHO, in the ICD-10, continues to use the diagnosis of *gender identity disorder*, describing it in the following terms:

"A disorder, usually first manifest during early childhood (and always well before puberty), characterized by a persistent and intense distress about assigned sex, together with a desire to be (or insistence that one is) of the other sex. There is a persistent preoccupation with the dress and activities of the opposite sex and repudiation of the individual's own sex. The diagnosis requires a profound disturbance of the normal gender identity; mere tomboyishness in girls or girlish behaviour in boys is not sufficient".⁸³

The continued use of the diagnostic label *gender identity disorder* raises concerns of a combined stigma of being transgender and having a mental disorder diagnosis, which could create a "double burdensome situation" for individuals belonging to an already vulnerable group, which, in turn, could compromise and affect their human rights and health.⁸⁴ The Council of Europe, Commissioner of Human Rights and the European Parliament strongly emphasised that issues pertaining to transgender identity should not be classified as mental disorders.⁸⁵ In 2011, the latter called on the WHO to remove gender identity disorders from their list of mental and behavioural disorders in the eleventh revision of the *International Classification of Diseases* ("ICD-11").⁸⁶ In June of 2018, the WHO published the draft version of the ICD-11, which would change the diagnostic label from gender identity disorder to gender incongruence:

"Gender incongruence of childhood is characterized by a marked incongruence between an individual's experienced/expressed gender and the assigned sex in pre-pubertal children. It includes a strong desire to be a different gender than the assigned sex; a strong dislike on the child's part of his or her sexual anatomy or anticipated secondary sex

⁸² American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 451. See also American Psychological Association *APA dictionary of psychology*.

⁸³ World Health Organization *International statistical classification of diseases and related health problems* (RS 10 2016) F64.0–F64.9.

⁸⁴ D Wilson "Transgender issues in South Africa, with particular reference to the Groote Schuur Hospital Transgender Unit" (2014) 104 *SAMJ* 448. See also J Drescher, PT Cohen-Kettenis & S Winter "Minding the body: Situating gender identity diagnoses in the ICD-11" (2012) 24 *Int Rev Psychiatry* 568–577.

⁸⁵ Council of Europe *Human Rights and Gender Identity* Commissioner for Human Rights. Issue Paper 2009 (01-08-2012) *Council of Europe* <<https://wcd.coe.int/ViewDoc.jsp?id=1476365>>.

⁸⁶ J Drescher "Controversies in Gender Diagnosis" (2013) *LGBT Health* 1–5. See also European Parliament "Sexual orientation and gender identity at the UN Human Rights Council" (2011) *European Parliament* <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0427+0+DOC+XML+V0//EN>> (accessed 09-07-2017).

characteristics and/or a strong desire for the primary and/or anticipated secondary sex characteristics that match the experienced gender; and make-believe or fantasy play, toys, games, or activities and playmates that are typical of the experienced gender rather than the assigned sex. The incongruence must have persisted for about 2 years. Gender variant behaviour and preferences alone are not a basis for assigning the diagnosis”.⁸⁷

In an effort to remove the stigma attached to gender dysphoria as a mental disorder, as it is classified in the ICD-10 and in the DSM-5, the ICD-11 classifies it as “conditions related to sexual health”. Other than the label being changed, the ICD-11 goes further than the ICD-10 by requiring that a diagnosis can only be made if the incongruence was persistent for about two years.⁸⁸ The ICD-11 was presented in May of 2019 for endorsement by Member States and will come into effect on 1 January 2022.⁸⁹

2 4 1 Diagnostic criteria and medical transitioning

The DSM-5 sets out an overarching diagnosis of gender dysphoria which provides specific criteria for children and adults. However, due to the scope and purpose of this thesis, the focus will be placed on the specific diagnostic criteria set for children.

The DSM-5 provides a list of requirements for *gender dysphoria*. This list consists of eight requirements of which the individual must experience at least six requirements for a period of at least six months.⁹⁰ They are:

“A strong desire to be of the other gender or an insistence that one is the other gender (or some alternative gender different from one’s assigned gender).” Second, “in boys (assigned gender), a strong preference for cross-dressing or simulating female attire; or in girls (assigned gender), a strong preference for wearing only typical masculine clothing and a strong resistance to the wearing of typical feminine clothing.” Third, “a strong preference for cross-gender roles in make-believe play or fantasy play.” Fourth, “a strong preference for the toys, games, or activities stereotypically used or engaged in by the other gender.” Fifth, “a strong preference for playmates of the other gender.” Sixth, “in boys (assigned gender), a strong rejection of typically masculine toys, games, and activities and a strong avoidance of rough-and-tumble play; or in girls (assigned gender), a strong rejection of

⁸⁷ World Health Organization *International statistical classification of diseases and related health problems* (RS 11 2018) ch 17 HA61.

⁸⁸ Chapter 17 HA61.

⁸⁹ C Lindmeier “WHO Releases New International Classification of Diseases (ICD-11)” (18-06-2018) WHO <[https://www.who.int/news-room/detail/18-06-2018-who-releases-new-international-classification-of-diseases-\(icd-11\)](https://www.who.int/news-room/detail/18-06-2018-who-releases-new-international-classification-of-diseases-(icd-11))> (accessed 06-05-2019).

⁹⁰ The time period prescribed in the DSM-5 differs from the 2-year time period prescribed by the ICD-11. See World Health Organization *International statistical classification of diseases and related health problems* (RS 11 2018) ch 17 HA61. See also American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 454.

typically feminine toys, games, and activities.” Seventh, “a strong dislike of one’s sexual anatomy.” Eighth, “a strong desire for the primary and/or secondary sex characteristics that match one’s experienced gender.”⁹¹

The most important component of the diagnosis is the incongruence experienced between the individual’s assigned and preferred gender, along with evidence of distress pertaining to the incongruence. However, gender dysphoria manifests in different ways in different age groups, since the expression of gender dysphoria, generally, develops with age.⁹² Children with gender dysphoria may assert their desire to be, or grow up to be, of the opposite gender. Children will often prefer or demand hairstyles, clothing, toys and to be called a name that suits their preferred gender.⁹³ It should be noted that many of the primary criteria set out by the DSM-5 draw on documented behaviour and developmental differences between “typically” developing girls and boys.⁹⁴

The American Psychiatric Association emphasises the difference between gender dysphoria and non-conformity to stereotypical gender role behaviour. *Gender non-conformity* consists of behaviour that does not match gender norms of the gender assigned to the individual at birth, for example, girls preferring to dress in ways that are normally, socially accepted for boys. Thus, mere tomboyish behaviour in girls would not be sufficient.⁹⁵ The WHO, in the ICD-10, also makes this emphasis. The ICD-11, however, differs in that it does not state that mere tomboyish behaviour is insufficient. What it does is to add a period of two years during which the incongruence must persist.⁹⁶

Further, a practising mental healthcare professional should make the assessment and diagnosis of gender dysphoria.⁹⁷ To be clinically diagnosed would thus enable the individual to enter therapy and thereafter undergo a medical transition. Medical transitioning primarily consists of using sex reassignment surgery and/or hormone treatment such as puberty blockers.⁹⁸ The Standards of Care set out by the WPATH

⁹¹ American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 454.

⁹² 454.

⁹³ 453.

⁹⁴ 455.

⁹⁵ 458. See also World Health Organization *International statistical classification of diseases and related health problems* (RS 11 2018) ch 17 HA61.

⁹⁶ Chapter 17 HA61.

⁹⁷ Wilson (2014) *SAMJ* 448.

⁹⁸ American Psychiatric Association (2016) www.psychiatry.org.

describes three types of medical transitioning treatments or “interventions” available to transgender individuals: i) *fully-reversible*, which includes puberty-delaying hormone treatment (puberty blockers) that is generally provided at the onset of puberty; ii) *partially-reversible*, which includes cross-sex hormone therapy, and is accessible to pubescent children; and iii) *irreversible*, which includes surgical alterations (sex reassignment surgery), which an individual can undergo at the age of majority.⁹⁹ The three types of treatment are also generally known as the Tanner stages: Stage one refers to puberty suppressing hormones; stage two refers to cross-sex hormone treatments, and stage three refers to sex reassignment surgery. Surgery is often the last step in the treatment process for gender dysphoria. For many individuals, surgery is vital and a medical necessity to alleviate their gender dysphoria, while other individuals find comfort with their gender identity, role, and expression without surgery.¹⁰⁰ For the former group, relief from discomfort cannot be attained without changing their primary and/or secondary sex characteristics to ascertain greater congruence with their preferred gender.¹⁰¹

2 4 2 Social transitioning

Importantly, not all transgender individuals might want a medical transition. A social transition entails an open exploration of the child’s gender identity without having a goal in sight.¹⁰² Social transitioning enables the child to present, in all aspects of their life, the gender that is congruent with their own sense of gender identity, which is the opposite of the gender assumed at birth. Social transitioning involves social changes in the child’s appearance, such as their hair and clothing and the pronoun that is used to refer to the child. It would typically also include changing the child’s name.¹⁰³ Social

⁹⁹ The World Professional Association for Transgender Health *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 10–11.

¹⁰⁰ The World Professional Association for Transgender Health *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 54. See also JJ Hage & RB Karim “Ought GIDNOS get nought? Treatment options for non-transsexual gender dysphoria” (2000) 105 *Plastic and Reconstructive Surgery* 1222–1227. See further, ED Skougard “The Best Interests of Transgender Children” (2011) *Utah L Rev* 1161.

¹⁰¹ Primary sex characteristics refers to the sexual organs. Secondary sex characteristics refers to other visible characteristics such as breast in biological females and facial hair in biological males. The World Professional Association for Transgender Health *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 54–55. See also Skougard (2011) *Utah L Rev* 1171.

¹⁰² JL Turban “Transgender Youth: The Building Evidence Base for Early Social Transitioning” (2017) 52 *Journal for the American Academy of Child and Adolescent Psychiatry* 101.

¹⁰³ Olson et al (2016) *Pediatrics* 3.

transitioning allows the child to publicly express their gender identity.¹⁰⁴ Olsen et al conducted the first study to suggest that social transitioning in early childhood might have desirable outcomes.¹⁰⁵ The study examined 73 pre-pubertal transgender children who all socially transitioned. The study found that the children's anxiety and depression metrics were similar to aged-matched cisgender children, which contrasted previous studies of children who were not allowed to socially transition.¹⁰⁶

Worldwide, many legislative provisions call for a medical transition before an individual can alter their assigned gender on official documents, such as a birth certificate or an identification document. This thesis, however, will argue that (i) these medical preconditions infringe on the transgender child's right to access legal gender recognition; and (ii) providing the transgender child with the opportunity to only socially transition would not be sufficient as it is merely a "buy-in" approach. Furthermore, the public environment, to which the child is exposed, that is, schools and other religious or cultural institutions, would not be obliged to protect, promote and respect the child's gender identity to the same extent as when the child's gender identity was legally recognised.

2 5 Conclusion

This chapter provided an analysis of the core definitions and terms pertaining to transgender and gender development. Several terms were defined, including gender and sex. To reiterate, whereas sex refers to the reproductive and biological classification of organs, *gender* refers to the cultural and social aspects of sex. *Gender* also involves the fundamental identity features in which an individual's life is organised. It is something that develops at an early stage, thus making it an integral part of an individual's inherent identity. The chapter highlighted the danger of conflating the terms, which has the effect of limiting and violating human rights.

Further, the chapter explored the medical and psychological terms associated with transgender and gender dysphoria by defining it and providing the diagnostic criteria. Through this, it was shown that identifying as transgender does not involve a mental

¹⁰⁴ The World Professional Association for Transgender Health *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 17.

¹⁰⁵ Olsen et al (2016) *Pediatrics* 1–8.

¹⁰⁶ 1–8. See also, Turban (2017) *Journal for the American Academy of Child and Adolescent Psychiatry* 101.

illness or disorder, since this creates a double burdensome situation while extending the scope of discrimination, stigmatisation and bullying to occur. Thus, the correct medical and more appropriate term is *gender dysphoria*. A disorder is generally denoted as a struggle or a state of confusion. This connotation should not be associated with an individual's inherent identity, since transgender individuals are not inherently disordered or in a state of confusion.¹⁰⁷

During the development phase of their gender, children are often left to negotiate the pressure to conform to their assigned gender category.¹⁰⁸ The recognition of gender identity plays a pivotal role in the sense of unease experienced by transgender individuals. Gender non-conforming behaviour and the violation of social expectations often lead to victimisation and discrimination, which will be discussed in the following chapters.¹⁰⁹

The following chapter will describe the different rights of transgender children under international and regional law. It will be argued that transgender children should be able to express their preferred gender identity without being marginalised or subjugated to a medical assessment. It will be argued that recognising gender identity as a right will be in their best interests, while giving effect to their rights to autonomy and development.

¹⁰⁷ The World Professional Association for Transgender Health *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 6.

¹⁰⁸ See American Psychological Association *APA Dictionary of Psychology* 2 ed (2015).

¹⁰⁹ Katz-Wise et al (2017) *Int J Transgend* 143.

CHAPTER 3: THE PROTECTION AND PROMOTION OF TRANSGENDER CHILDREN'S RIGHTS IN TERMS OF INTERNATIONAL LAW

3 1 Introduction

International law is a body of legal rules, regulations and standards that are established by customs or treaties and are recognised by nations as binding in their relations with each other.¹ It applies to sovereign states and other entities that are legally recognised as State Actors or Member States, such as international organisations and individuals. Member States bind themselves to international law and, as such, it has a significant influence on the sphere of human rights. Member States should ensure that their actions conform to the principles and rules of international law.² International law has played a significant role in the development, protection, and promotion of children's rights.

Up until the nineteenth century, children were mainly considered economic assets and quasi-property.³ The aim of the first instruments that dealt with the protection of children only did so to a certain extent, such as protection from specific forms of economic and sexual exploitation, while reflecting an unquestioned assumption that children are entirely dependent upon the "exclusive protection of adults to ensure the exercise of their rights".⁴ Children were perceived as the objects of international laws and instruments and not the subjects thereof.⁵ This assumption continued to be accepted up until the 1970s. The perspectives of children were either absent or assumed to accord with the perspectives of adults.⁶ In 1989, the international community, for the first time, acknowledged children as holders of rights. The UNCRC not only provided children with the rights to protection, prevention, and provision, but also participation rights.⁷ The ultimate acceptance and implementation of the UNCRC

¹ MN Shaw *International Law* 6 ed (2016) 5.

² 5.

³ G van Bueren "The Historical Framework of the International Documents on Children" in G van Bueren (ed) *International Documents on Children* 2 ed (1998) xv–xix.

⁴ xv–xix.

⁵ Children's Rights in Wales: United Convention on the Rights of the Child "History of Children's Rights" (2007) *Childrensrightswales* <<http://www.childrensrightswales.org.uk/history-of-children-rights.aspx>> (accessed 04-10-2017).

⁶ Van Bueren "The Historical Framework of the International Documents on Children" in *International Documents on Children* xv–xix.

⁷ xv–xix.

led the international community to view and examine the international laws of children from a child rights perspective.⁸

In the international sphere, the increased amount of attention paid to children's rights has been renowned "as a striking change in the post-war landscape".⁹ However, currently there are no international human rights treaties, categorised as "hard law" (legally binding), that explicitly protects LGBTQI individuals. Nevertheless, this does not mean that they do not enjoy the protection granted under international human rights laws. Substantial steps can be observed from the international and regional committees and courts in terms of recognising gender identity as a protected right.

This chapter will commence with a brief discussion of child law and the development and theory of children's rights. The discussion will then move to international law and analyse global international and regional documents, instruments and standards on children's rights and the evolution thereof, while highlighting how international law protects and promotes the rights of transgender children to recognition. Furthermore, General Comments and recommendations from international and regional human rights bodies will be analysed.

3 2 Child law

Child law consists of three pillars: the first pillar comprises of the rights, capacities, and status of the child as an individual; the second concerns the relationship between the parent and the child; and the third pillar involves the relations between the State and the child. Individually, these three pillars spread across all bodies of law and represent the modern notion of child law. This modern notion breaks the conventional segregation between private law and public law as well as the distinctions between family law and the law of persons.¹⁰ In terms of the modern notion, there is a duty on the State, who is further obligated to impose this responsibility on parents, to respect, protect, and promote children's human rights.¹¹

Modern child law includes elements of human rights law and also, increasingly, international law.¹² Modern child law has two main elements: the child, and the central

⁸ xv–xix.

⁹ SR Arnott "Family law: Autonomy, Standing, and Children's Rights" (2007) 33 *William Mitchell Law Review* 809 808.

¹⁰ L Schäfer "Introduction to child law" in T Boezaart (ed) *Child Law in South Africa* (2009) 6.

¹¹ Schäfer "Introduction to child law" in *Child Law in South Africa* 6.

¹² 6.

role that human rights play in protecting the child. It observes the child as an agent in their own right. Agency allows the child to exercise their right to autonomy, the right to be heard, freedom of expression and freedom of association.¹³ The legal rules pertaining to children are constantly changing, which is primarily due to the change in society and the evolving nature of children over the years.¹⁴ What society regarded as good and correct 20 years ago, might not be regarded in the same manner today.

Child law applies directly to every individual under the age of 18.¹⁵ A 2016 census found that children constitute nearly 33.7% of the South African population, which could be regarded as a substantial demographic.¹⁶ Despite the fact that children constitute such a large part of the population, they are still considered a vulnerable group compared to adults.¹⁷ As a vulnerable group, it is not surprising that children are often victims of human rights violations committed by adults who are morally and legally obliged to protect and care for children.

Furthermore, conflicts frequently arise between the three abovementioned pillars of child law, which can be viewed as one of the challenges in child law.¹⁸ Determining the limits of child law and more specifically, the limit of the child's rights and capabilities, underlies one of the challenges in child law. For example, it is often difficult to determine how much autonomy the child has in accessing rights and freedoms. In order to avoid conflict, many legislative frameworks follow a status-based approach by placing an age limit on accessing rights and opportunities, such as access to legal gender recognition.¹⁹ Age is therefore an important factor that influences the child's capacities and status, with status depicting an individual's standing and legal position in law.²⁰ The effect of age is unique because it varies between birth and majority. At

¹³ This list, however, is not limited to the elements that are mentioned.

¹⁴ T Boezaart "Child Law, the Child and South African Private Law" in T Boezaart (ed) *Child Law in South Africa* 2 ed (2017) 3.

¹⁵ It is recognised that the age of childhood is not the same in all foreign jurisdictions. For the purpose of this thesis, 18 is deemed sufficient as it aligns with the South African definition provided for in the legislative framework. See section 17 of the South African Children's Act.

¹⁶ Statistics South Africa "Table 1.1.2: Percentage of children as a proportion of the overall population" (2016) *Stats SA* <<http://www.statssa.gov.za/publications/Report-03-19-02/Report-03-19-022016.pdf>> (accessed 11-02-2018).

¹⁷ *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 6 SA 632 (CC) para 26.

¹⁸ L Schäfer *Child law in South Africa: Domestic and international perspectives* (2011) 4.

¹⁹ See heading 1 2 for an explanation of legal gender recognition.

²⁰ Boezaart "Child Law, the Child and South African Private Law" in *Child Law in South Africa* 2 ed 18.

birth, infants take their first breath with no capacities to act on their own. It is during the stage of infancy where parental responsibilities are at its most intense stage.²¹

Another challenge identified by scholars of child law, is the need to devise legal principles that can accommodate the evolving nature of the child. This challenge is more evident today than ever before. Many jurisdictions take the evolving nature of the child into consideration when applying the strategy of incremental empowerment. This is done by gradually granting children more rights and obligations as they approach adulthood. However, this process of gradual empowerment does not occur on a consistent basis; it varies in each jurisdiction and for every child. Some legal capacities will be gained as the child reaches a level of maturity, while others may manifest at a certain age, which stems from a status-based approach.²² The process of gradual empowerment affects parental responsibilities and rights. In *Hewer v Bryant*, Lord Denning stated that parental authority “starts off with a right of control and it ends with little more than advice”.²³ Even though it is called a process of gradual empowerment, it should be noted that the gap between the legal capacities of an 18-year-old and the restricted capacities of a 17-year-old is surprisingly wide.²⁴

These difficulties are often addressed when discussing the theory of children’s rights. It is therefore important to understand the development and theoretical framework when delving into the complexity of transgender children’s rights.

3 3 The importance and theory of children’s rights

3 3 1 Introduction

Since the recognition of children as subjects of rights, the rights of children under international law have continually been developed. Before discussing the rights of children under the international law, it is important to understand the historical development of children’s rights, as well as the theories underlying it – something that Human describes as being complex.²⁵

²¹ Human “The Theory of Children’s Rights” in *Child Law in South Africa* 243–249.

²² Schäfer *Child Law in South Africa* 5.

²³ *Hewer v Bryant* 1970 1 QB 357 para 369.

²⁴ Schäfer *Child Law in South Africa* 6

²⁵ Human “The Theory of Children’s Rights” in *Child Law in South Africa* 243.

3 3 2 The development of children's rights

For a large part of Western history, the period of childhood was marked by a status of legal incapacity. However, towards the seventeenth to eighteenth centuries, the attitude towards children began to change and children's contributions to the family were being recognised.²⁶ Towards the beginning of the twentieth century, children were considered a special class worthy of education, protection, and maintenance by their parents. This appreciation of their sentimental value replaced their previous economic value.²⁷ The State also adopted a more distinct approach in the lives of families and children, and continued to assume its position as *parens patriae*.²⁸ During the first half of the twentieth century, legislation introduced minimum standards of health care, compulsory education and the prevention of abuse and neglect. However, the implementation of these legislative measures caused much friction and debate due to their serious intrusion into family life and parental authority.²⁹

In 1924, the League of Nations adopted the Geneva Declaration on the Rights of the Child ("Geneva Declaration"), which made it the first international human rights declaration adopted by an inter-governmental organisation.³⁰ The Geneva Declaration regard children as a particular group of individuals worthy of protection, specifically, their economic, social, and psychological needs. The full title of the Geneva Declaration is somewhat misleading in that it regards children as recipients of treatment and not as bearers of rights as the title alludes to.³¹ Children were still seen as passive objects of concern.³² The Declaration of 1924 was not intended to be a binding treaty; its intention was merely to create guiding principles.³³ In 1959, the

²⁶ M Freeman "Introduction" in M Freeman (ed) *Children's Rights* (2004) xi.

²⁷ DM Richett & JR Hudson "The Socio-Legal History of Child Abuse and Neglect: An Analysis of the Policy of Children's Rights" (1979) 6 *J Soc and Soc Welfare* 849 850.

²⁸ *Parens patriae* is Latin for "the parent of his or her country". See Frank "Parens Patriae in Juvenile Justice: Definition & Doctrine" (02-04-2018) *Study.com* <<https://study.com/academy/lesson/parens-patriae-in-juvenile-justice-definition-doctrine.html>>.

²⁹ L Mills *Considering the best interests of the child when marketing food to children: an analysis of the South African regulatory framework* LLD thesis, Stellenbosch University (2016) 48 and 250.

³⁰ T Buck *International Child Law* 2 ed (2011) 23. See Mills *Considering the best interests of the child when marketing food to children* 48. See also M Freeman "Introduction: Children as Persons" in M Freeman (ed) *Children's Rights: A Comparative Perspective* (1996). See further, Van Bueren "The Historical Framework of the International Documents on Children" in *International Documents on Children* xv.

³¹ Van Bueren "The Historical Framework of the International Documents on Children" in *International Documents on Children* xv.

³² Buck *International Child Law* 23.

³³ 23. See also Van Bueren "The Historical Framework of the International Documents on Children" in *International Documents on Children* xv.

Geneva Declaration in an extended form was adopted by the UN and came into force. Unlike its predecessor, the 1959 Declaration used a more robust language of entitlement which led to the view that children are subjects of international law.³⁴ The 1959 Declaration also introduced the best interests of the child principle by stating that it should be “the paramount consideration” whenever protection laws regarding children came into play.³⁵ However, this position represented a one-sided approach, being the provision of protection of the child. As a result, a more systematic approach was continuously called for.³⁶ The position changed with the ratification of the UNCRC in 1989 and the notion of children as rights bearers gained momentum.³⁷

Despite the global recognition of the UNCRC, the practical implementation of children’s rights remained controversial, in particular, the disparity of establishing children’s rights on a theoretical level.³⁸

3 3 3 The theoretical framework: The importance of rights and interests

It is important to understand why children have rights, otherwise it would be difficult to justify the notion of children as rights bearers, and, as a result, policies or legislation which promote the rights of children would have no authority or legitimacy.³⁹ Rights are important, not just for children, but for humanity as a whole. Bandman describes rights as something that “enables us to stand with dignity ... to demand what is our due”.⁴⁰ Freeman calls it “important moral coinage”, which can be used as “valuable commodities”.⁴¹ Rights are available to all: they are universal. Rights are inter-

³⁴ Buck *International Child Law* 23. See also Freeman “Introduction: Children as Persons” in *Children’s Rights: A Comparative Perspective* 2.

³⁵ Freeman “Introduction: Children as Persons” in *Children’s Rights: A Comparative Perspective* 2. See Mills *Considering the best interests of the child when marketing food to children* 259.

³⁶ Buck *International Child Law* 23. The International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171 (“ICCPR”) provided the child protection rights from discrimination, a right to a name and nationality. Article 24 states:

“1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality”

Further, the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS 3 (“ICESCR”) provided for the Right to health (Article 12) and education (Article 13).

³⁷ Van Bueren “The Historical Framework of the International Documents on Children” in *International Documents on Children* xvi.

³⁸ Mills *Considering the best interests of the child when marketing food to children* 263.

³⁹ Human “The Theory of Children’s Rights” in *Child Law in South Africa* 244.

⁴⁰ B Bandman *Children’s Right to Freedom, Care and Enlightenment* (1999) 36.

⁴¹ M Freeman *The Moral Status of Children: Essays on the Rights of the Child* (1997) 83.

dependent and interconnected, and include a wide range of civil, social, political, cultural, and economic rights. To deny one right leads to the denial and undermining of other rights.⁴² Rights, therefore, can be used as a security mechanism with which to protect the interests of the claimant.⁴³ This could be deemed as problematic when dealing with vulnerable individuals, such as children, who are not capable of asserting their claims and interests.

According to the “interest theory”, rights will be based upon the child’s need for protection rather than waiting for the child to be capable of claiming rights, as is required in terms of the “will theory”. Buck argues that if society generally recognises the child’s need for care and protection, there should emerge a collection of “moral rights” which will be transformed into “legal rights”.⁴⁴ According to Fortin, moral rights transform into legal rights when the rest of society recognises the importance of such rights.⁴⁵ The fundamental point of the interest theory is that children should not be denied legal rights merely because they are not mature or capable of making informed choices. However, not all interests of children are transformed into moral rights and subsequently progress to legal rights. Buck identifies this as one of the flaws of the interest theory. The difficulty lies in establishing a criterion to assess the various interests of children which could transform into legal rights.⁴⁶ Eekelaar provides a practical solution to the problem. He suggests that adults should “make some kind of imaginative leap and guess what a child might retrospectively have wanted once it reaches a position of maturity”.⁴⁷ He arranged children’s interests into three groups: “basic”, “developmental” and “autonomy” interests. Children’s need for immediate physical, emotional, and intellectual care forms part of their basic interests. Their need to heighten their developmental potential by having equal access to appropriate resources, forms part of their developmental interests. The need for children to make

⁴² M Freeman “The Value and Values of Children’s Rights” in A Invernizzi & J Williams (eds) *The Human Rights of Children: From Visions to Implementation* (2011) 21.

⁴³ Mills *Considering the best interests of the child when marketing food to children* 52.

⁴⁴ Buck *International Child Law* 26.

⁴⁵ J Fortin *Children’s rights and the developing law* 3 ed (2009) 12. See also Buck *International Child Law* 26:

“A legal right is a claim that is acknowledged by a legal system and which is enforced in a court. A moral right does not enjoy the same acknowledgement and primarily entails a claim to humanitarian considerations”.

See also Human “The theory of Children’s rights” in *Child law in South Africa* 244–245.

⁴⁶ Buck *International Child Law* 26.

⁴⁷ Eekelaar “The Emergence of Children’s Rights” (1986) 6 *Oxford Journal of Legal Studies* 161–182 166. See also Buck *International Child Law* 26.

independent decisions about their lives, forms part of their autonomy interest.⁴⁸ Naturally, these interests can stand in conflict with one another. Eekelaar proposes that where the child's autonomy conflicts with the developmental and/or basic interests, the latter should prevail.⁴⁹

Freeman advocates that the moral integrity of children must be recognised. Children need to be treated as persons entitled to equal respect and concern, and have both their present autonomy recognised and their capacity for future autonomy safeguarded.⁵⁰ This approach would acknowledge that children, specifically younger children, need care, nurture, and protection. This acknowledgement recognises that children have additional rights that adults do not have. This would inevitably lead to an acceptance to intervene and protect the child from irrational actions. However, what is to be considered as "irrational" should be monitored carefully.⁵¹ What is regarded as irrational should strictly be confined and defined through a neutral theory that would be "capable of accommodating pluralistic visions of the good".⁵² A decision should be regarded as an irrational one if it undermines the individual's future life choices and impairs interests in an irreversible way.⁵³ In order to test the rationality of a decision, it should be confined to justifying the intervention of the child's autonomy only to the extent necessary to forestall the immediate harm. Using the "imaginative leap" notion, referred to above, would thus justify the view that adults would be unlikely to retrospectively approve decisions that would prejudice the child's future life chances. Freeman argues that future-orientated consent should be regarded as a mechanism to legitimise interference with the child's autonomy. The question should be if the restriction can be "justified in terms that the child would eventually appreciate" which he admittedly regards as a difficult test to apply.⁵⁴

In addition, mistakes should be tolerated, and society should not treat individuals as equals without acknowledging and respecting their capabilities to make mistakes and to take risks. Rights would therefore not be taken seriously if autonomy is only respected and recognised when it is considered that the agent is doing the right thing,

⁴⁸ Eekelaar (1986) *Oxford Journal of Legal Studies* 167. See Buck *International Child Law* 26.

⁴⁹ Eekelaar (1986) *Oxford Journal of Legal Studies* 171.

⁵⁰ Freeman "The Value and Values of Children's Rights" in *The Human Rights of Children: From Visions to Implementation* 31.

⁵¹ 33.

⁵² 33.

⁵³ 33.

⁵⁴ 33.

and when the action or decision would be regarded as being in line with what society regards as correct.⁵⁵

3 4 Applicable children's rights

3 4 1 Introduction

For most aspects of child law in South Africa, the two main sources of international law are the UNCRC and the ACRWC. There are various other sources of international and regional laws that afford additional protection to children and promote children's rights, such as the African Charter on Human and Peoples' Rights ("African Charter"), the American Declaration of the Rights and Duties of Man ("American Declaration"), the American Convention on Human Rights ("American Convention"), and the European Convention on Human Rights and Fundamental Freedoms ("ECHR").⁵⁶ All such sources of international law should be regarded as complementary and interrelated. However, not all these sources consist of binding legal obligation resting on South Africa. As previously mentioned, section 39(1)(b) of the South African Constitution states that international law must be considered when interpreting the Bill of Rights. Whereas section 231(4) states that any international treaty becomes law in South Africa when it has been ratified and enacted into law by national legislation, which has the effect of binding South Africa as a Member State to such treaties. Furthermore, the approaches adopted by regional bodies to interpreting the internationally protected rights of children may also be considered. In order to determine the right of transgender children to legal gender recognition, this section will evaluate relevant parts of the United Nations human rights system as well as the Inter-American and African regional human rights systems.

⁵⁵ 33.

⁵⁶ Schäfer *Child Law in South Africa: Domestic and international perspectives* 73. For example the Optional Protocols to the CRC on Sex Trafficking and Armed Conflict; the European Convention on the Exercise of Children's Rights (adopted on 28 January 1996, entered into force 1 July 2000) 213 UNTS 262; the ICESCR; the ICCPR; the European Convention on Human Rights and Fundamental Freedoms (adopted 4 November 1950 entered into force 3 September 1953) 213 UNTS 221; the African Charter on Human and Peoples' Rights (adopted 27 June 1981 entered into force 21 October 1986) 1520 UNTS 217 (Banjul Charter) and its Protocol, Convention on the Elimination of all Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; the Hague Convention on Parental Responsibility for the Protection of Children (adopted on 19 October 1996, entered into force 1 January 2002) 2008 EC 431; the Hague Convention on the Civil Aspects of International Child Abduction (adopted on 25 October 1980, entered into force 1 December 1983) 1343 UNTS 89.

The UNCRC is the main legal instrument on the protection and promotion of children's rights in the international legal framework. It is both the most comprehensive human rights treaty and the most widely ratified treaty that specifically focuses on children. As at June 2019, it had 196 Member States. Only one State, the United States of America, has not ratified the treaty.⁵⁷

The UNCRC has four general principles, which guide the application of the document as a whole:

- Article 2 guarantees that there shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinions, national, ethnic or social origin, property, disability, birth or other status;
- Article 3 provides that the best interests of the child shall be a primary consideration in all actions concerning the child;
- Article 6 instructs State Parties to ensure to the maximum extent possible that every child has the inherent right to life, development, and survival; and lastly,
- Article 12 grants children the right to express their views freely in all matters affecting them and that their views are given due weight in accordance with their age and level of maturity.⁵⁸

In 1990, the Assembly of the Organization of African Unity adopted the ACRWC. Unlike the UNCRC, the ACRWC is a regional instrument. The ACRWC grew out of Article 18(3) of the African Charter, and the Organization of African Unity's Declaration on the Rights of the Child.⁵⁹ Article 18(3) of the African Charter states that Member States shall eliminate every form of discrimination against the child and further ensure the protection of their rights.⁶⁰ The duty on Member States to eliminate inequalities

⁵⁷ United Nations Treaty Collection "Depository" (2019) *UN Treaties* <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en> (accessed 03-06-2019). The USA has signed the treaty but has not ratified it.

⁵⁸ UN High Commissioner for Refugees (UNHCR) "UNHCR Guidelines on Determining the Best Interests of the Child" (May 2008) *UNHRC* <<http://www.unhcr.org/4566b16b2.pdf>> (accessed 10-02-2018) 14.

⁵⁹ F Viljoen "Why South Africa should ratify the African Convention on the Rights and Welfare of the Child" (1999) 116 *SALJ* 660. South Africa ratified the African Charter in 1996. See African Commission on Human and Peoples' Rights "Ratification Table: - African Charter on Human and Peoples' Rights" (2018) *achpr.org* <<https://www.achpr.org/ratificationtable?id=49>> (accesses 09-11-2019).

⁶⁰ Article 18(3) states that:

"The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions".

and harmful cultural practices is also echoed in the Declaration on the Rights of the Child, which called upon Member States to address the inequalities of female children; to adopt measures that would abolish harmful cultural practices (such as child marriages), and to prioritise the need of vulnerable and deprived children.⁶¹ Furthermore, Schäfer et al opine that the ACRWC was predominantly adopted as a reaction to the perceived marginalisation of African States in the drafting of the UNCRC.⁶² As at June 2019, the ACRWC has been ratified by 41 out of 54 states within the African Union. South Africa ratified it in 2000.⁶³ Therefore, as a Member States to the UNCRC and the ACRWC, South Africa has an abiding legal obligation in terms of section 231(4) of the Constitution to give effect and implement both treaties. Section 233 of the Constitution clarifies the application of international treaties and states that courts must prefer any reasonable interpretation of the legislation that is consistent with international law. Further, section 39(b) states that international law must be considered when interpreting the Bill of Rights.

3 4 2 The best interests of the child

3 4 2 1 *Basis of the best interests of the child principle*

The best interests of the child principle can be found in a number of international documents and instruments that protect and promote the rights of children. The Geneva Declaration of 1924 is one of the first international documents to provide protection to children. Although the Geneva Declaration does not use the words “best interests”, the concept remains evident. The preamble states that “mankind owes to the child the best that it has to give”. Later, Principle 2 of the 1959 Geneva Declaration states that the child has the right to special protection and opportunities by law and by other means with the goal of enabling children to develop physically, mentally, morally, spiritually and socially in a manner that could be regarded as healthy and normal,

⁶¹ Paras 3–12 of the Geneva Declaration. See Schäfer *Child Law in South Africa* 94.

⁶² Schäfer *Child Law in South Africa* 94. See Viljoen (1999) SALJ 660. See also Van Bueren “The United Nations Convention on the Rights of the Child: An Evolutionary Resolution” in *Introduction to Child Law in South Africa* 218.

⁶³ African Commission on Human Rights and Peoples’ Rights “Ratification Table: African Charter on the Rights and Welfare of the Child” (2018) ACHPR <<http://www.achpr.org/instruments/child/ratification/?s=deposited>> (accessed 10-02-2018).

coinciding with their freedom and dignity. The 1959 Geneva Declaration also states that the best interests of the child should be the paramount consideration.⁶⁴

Article 3 of the UNCRC states that the best interests of the child shall be a primary consideration. The ACRWC also, in Article 4, provides that the best interests of the child shall be the primary consideration. Notably, the UNCRC and the ACRWC differ in promoting the best interests of the child. Whereas the UNCRC states that the best interests of the child shall be a primary consideration, the ACRWC states that it should be *the* primary consideration. According to Gose, it is therefore arguable that the UNCRC allows for a consideration of the best interests of the child in conjunction with other principles, whereas the ACRWC elevates the best interests of the child to a level of supremacy over other considerations.⁶⁵ Another notable difference is that the UNCRC states that the best interests of the child should be considered in all actions concerning children, and the ACRWC states it should be considered in all actions concerning the child.

Furthermore, Article 3 of the UNCRC and Article 4 of the ACRWC recognises the best interests of the child as the main criterion in all decisions that affect the rights of children, which is echoed in both organs of the Inter-American system. Article 19 of the American Convention provides for the rights of children and states that every child has the right to protection measures, while Article VII provides for special protection, care, and aid.⁶⁶ Therefore, in order to ensure the centrality of the best interests of the child, protection measures should be in place, which, in effect, requires identifying children in need of special protection measures, with the aim of enabling their rights to development and dignity.

⁶⁴ Principle 2 of the 1959 Geneva Declaration states that:

“The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable ... [them] to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration”.

⁶⁵ M Gose *The African Charter on the Rights of the Child: An assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child* (2002) 25–27.

⁶⁶ Inter-American Commission on Human Rights “Fulfilment of Children’s Rights” (2017) *IACHR* 126. Article 19 of the American Convention states that:

“Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state”.

Furthermore, VII of the American Declaration on the Rights and Duties of Man states that:

“[A]ll children have the right to special protection, care and aid”.

3 4 2 2 *Interpreting the best interests of the child principle*

Article 3 of the UNCRC states that:

- “1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures ...”.

Whereas article 4 of the ACRWC states that:

- “1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.
2. In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law”.

The word “actions” includes all acts, proposals, conduct, services, decisions, procedures, and other measures. It follows therefore that a failure to act is also an “action”, although technically rather an “inaction”. Thus, the legal duty applies to all actions concerning the child, whether directly or indirectly applicable.⁶⁷ The term “children” can be construed to refer to an individual child, a group of children in general, and also other measures that may have an effect on the child or a group of children.

The term *best interests* can be described as referring to the well-being of the child.⁶⁸ The well-being of the child can be affected by various factors, such as the restrictions on their capabilities, and also their environment and experiences.⁶⁹ It is accepted that Article 3 of the UNCRC and Article 4 of the ACRWC expresses one of the fundamental

⁶⁷ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 1 on Article 30 of the ACRWC: “Children of Incarcerated and Imprisoned Parents and Primary Caregivers”*, 8 November 2013, available at: <<https://www.refworld.org/docid/545b49844.html>> (accessed 27 August 2018) 12.

⁶⁸ UNHCR “Guidelines on Determining the Best Interests of the Child” *UNHRC* 14.

⁶⁹ 14–15.

values of both documents.⁷⁰ A closer look at Article 3 reflects the mandatory nature of the obligation by the use of the word “shall” whereas the word “consideration” emphasises that the child’s interests must be taken into account. The word “shall” infer that Member States may not exercise discretion as to whether the child’s best interests should be assessed.⁷¹ The obligation placed on Member States to assess and duly consider the best interests of the child is a comprehensive obligation placed on all social welfare institutions, courts and legislative bodies concerning children.⁷² Therefore, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) states that this obligation demands that Member States have procedural guarantees in place.⁷³ Unlike the UNCRC, the ACRWC states that any person or authority should fulfil the best interests of the child, which places a duty on all officials or persons that comes into contact with the child or deal with a matter that involves the child.⁷⁴

The best interests of the child principle is aimed at ensuring the full and effective enjoyment of all rights, and the holistic development of the child.⁷⁵ In General Comment 13, the Committee emphasises that an adult’s judgement of the child’s best interests cannot “override” the obligation to respect the rights of the child under the UNCRC.⁷⁶ In General Comment 14, the Committee scrutinises the standard and states that the standard should be regarded as a “dynamic threefold concept”. First, the best interests of the child principle is a substantive right. Thus, when different interests are being considered in order to reach a decision on a given issue, the best interests of the child shall be a primary consideration. The standard must be implemented whenever decisions concerning the child are to be made. Second, the

⁷⁰ UN Committee on the Rights of the Child (UNCRC), General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, UN Doc CRC /C/GC/14. See also African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 1 on Article 30 of the ACRWC: "Children of Incarcerated and Imprisoned Parents and Primary Caregivers"* (2013) 9.

⁷¹ Para 36.

⁷² UNHCR “Guidelines on Determining the Best Interests of the Child” *UNHRC* 14.

⁷³ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No. 1 on Article 30 of the ACRWC: “Children of Incarcerated and Imprisoned Parents and Primary Caregivers” (2013) 12.

⁷⁴ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No. 1 on Article 30 of the ACRWC: “Children of Incarcerated and Imprisoned Parents and Primary Caregivers” (2013) 12.

⁷⁵ UN Committee on the Rights of the Child (UNCRC), General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, UN Doc CRC/GC/2003/5. Inter-American Commission on Human Rights (2017) *IACHR* 126.

⁷⁶ UN Committee on the Rights of the Child (UNCRC), General Comment No. 13 (2011): The right of the child to freedom from all forms of violence, 18 April 2011, UN Doc CRC/C/GC/13.

standard shall serve as a fundamental interpretive legal principle, which means that when a legal provision or a right is open to more than one interpretation, the interpretation that will best serve the child's best interests should be regarded as the correct interpretation thereof. Third, the standard is a rule of procedure stipulating that the assessment process should include an evaluation of the possible impact of the decision on the child.⁷⁷

The standard should be applied to the specific context, and the decision should ensure the holistic development of the child. An analysis of the child's best interests should comprise of a careful, considerate and informed assessment of the child's interests.⁷⁸ Determining the best interests of the child involves a formal process which should ensure adequate participation from the child, without discrimination.⁷⁹

3 4 2 3 *Applying the best interests of the child principle*

The preamble of the UNCRC provides that the child should grow up in an environment and atmosphere of happiness, love and understanding which should ready the child to live an individual life in society. This means that within every aspect relating to the child, the best interests of the child must be taken into account. The UNCRC and the ACRWC does not outline specific definitions or factors that must be considered when evaluating the best interests of the child, but it does stipulate that the best interests should be seen as the determining factor for specific actions.⁸⁰

There are other legal bases that provide for the best interests of the child at the international and national level which could affect the assessment process.⁸¹ National law may provide specific guidance on principles found in the international legal framework.⁸² The best interests of the child standard is the most discussed provision in the UNCRC and the ACRWC.⁸³ However, the best interests of the child standard is not set in stone. Rather, the concept of determining the child's best interests is complex and therefore should be established on a case-by-case basis. It is flexible

⁷⁷ UN Committee on the Rights of the Child (UNCRC), General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) para 6. See also Bucataru (2016) QMHRR 59 64.

⁷⁸ Bucataru (2016) QMHRR 64.

⁷⁹ UNHCR "Guidelines on Determining the Best Interests of the Child" UNHRC 23.

⁸⁰ 15.

⁸¹ See heading 5 2 2 4 and heading 5 3 3.

⁸² 15.

⁸³ Bucataru (2016) QMHRR 64.

and adaptable. It should be adjusted to the child's specific circumstances when assessing their best interests.⁸⁴ The child's personal context, situation and needs should be considered. Thus, the best interests of the child should be realised with full regard for the rights enshrined within the international and national legal framework.⁸⁵ The best interests assessment is perpetual and complicated, especially when the subject involves access to capabilities, such as the case with young transgender children.⁸⁶

3 4 3 The right to autonomy

Article 12(1) of the UNCRC provides children with the right to express their views in all decisions that affect them. It states that:

"States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child".

Generally, because children are young and in a vulnerable position, their views are not always taken into account in all decisions that affect them.⁸⁷ Children are typically excluded from certain activities and capabilities. In General Comment 12, the Committee states that Article 12 is a unique provision in a human rights treaty, in that it addresses the child's legal and social status, who, on the one hand is a subject of rights, but on the other, lacks the full autonomy of adults.⁸⁸ For example, in South Africa, children have to reach the age of 16 to apply for an identification document⁸⁹ and 18 in order to purchase alcohol⁹⁰ and tobacco⁹¹ or to get their driver's license.⁹² All these exclusions rely on the notion that the restrictions are in place to protect

⁸⁴ UN Committee on the Rights of the Child (UNCRC) General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc CRC/C/GC/14 para 32.

⁸⁵ Para 32–34.

⁸⁶ Bucataru (2016) *QMHR* 64.

⁸⁷ UN Committee on the Rights of the Child (UNCRC) General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc CRC/C/GC/14 para 54.

⁸⁸ UN Committee on the Rights of the Child (UNCRC), *General Comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, UN Doc CRC/C/GC/12. See also Inter-American Commission on Human Rights (2017) *IACHR* 119.

⁸⁹ Section 8 of the Identification Act 68 of 1997.

⁹⁰ Section 35(1)(a) of the Liquor Act 59 of 2003.

⁹¹ Section 7(2) of the Tobacco Products Control Act 83 of 1993.

⁹² Section 15 of the National Road Traffic Act 93 of 1996.

children from potentially harmful activities, while adults are at liberty to harm themselves. In order to avoid any harm to children caused by their “less matured judgement”, the law reacts by taking these decisions out of their hands.⁹³ The South African legislative framework either limits the child’s capabilities to make certain decisions, or completely excludes it. The aim is to protect the child from harmful activities and to shield the child from any legal consequences that may flow from these interactions. The general assumption is that adults should be masters of their own destinies and as a result, they should be able to live with the consequences of their decisions. The assumption indicates that children generally lack the capacity and maturity to make these decisions and therefore they should not be able to incur any liabilities.⁹⁴

3 4 3 1 *Participation versus protection*

The right to participate adjoins to the right to autonomy. Autonomy grants all persons the right to self-determination and independence; it holds critical competence and the capacity for reasoning. To grant and respect the child’s right to autonomy is to treat the child as a person that bears rights.⁹⁵ Being a rights-bearer, allows individuals to make choices and to take risks. The belief is commonly held that children have fewer abilities and capabilities, which would make them more vulnerable. They need protection, and without protection, they will not be able to exercise their rights to autonomy and participation.

Article 12 of the UNCRC states that due weight should be given to the child’s views in accordance with the child’s age and maturity. The right to be heard forms part of the foundational values of the UNCRC in that it is included in the right to participation. Thus, the right to be heard is not only a right in itself but should also be considered when interpreting or implementing all the other rights. This highlights the inter-relation of the UNCRC as a whole. The Committee stresses that the views of children should be taken into consideration in decision-making, policy and law-making, seeing that these views may add relevant perspectives.⁹⁶

⁹³ Schäfer *Child Law in South Africa* 185.

⁹⁴ 185–186.

⁹⁵ Freeman “The Value and Values of Children’s Rights” in *The Human Rights of Children: From Visions to Implementation* 30.

⁹⁶ UN Committee on the Rights of the Child (UNCRC), *General Comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, UN Doc CRC/C/GC/12 para 10.

Article 12 of the UNCRC states that Member States “shall assure” that children have the right to fully express their views. Thus, the use of the word “shall” imply that there should be no leeway for Member States to use their discretion. Member States are therefore under the obligation to ensure that appropriate measures are in place to realise this right for all children.⁹⁷ Article 12 further stipulates that Member States shall guarantee the right to be heard to all children capable of forming their own views. At first sight, the wording appears to be restrictive, but in General Comment 12, the Committee emphasises that it should not be interpreted as a limitation, but rather as an obligation on Member States to assess the capabilities of children to form their own autonomous opinions. Thus, Member States cannot assume that a child is incapable of forming their own opinions. The Committee states that the only assumption Member States should make is that the child is capable of forming an opinion and that the burden does not lie with the child to prove this capacity.⁹⁸ Notably, Article 12 does not imply any specific age restrictions on children to express their views, which could be regarded as discouraging Member States from introducing a status-based approach such as age limits in their laws. Therefore, the child’s right to be heard should not be restricted.

The provision further states that children should be able to express their views freely, without manipulations, influence or pressure, which promotes the self-declaration approach.⁹⁹ However, the provision states that due weight shall be given to children’s views in accordance with their age and maturity. Maturity refers to the child’s ability to understand and assess the matter at hand. The Committee admits that maturity is difficult to define; however, they assert that it refers to the child’s capacity to express views in a reasonable and independent manner, while also considering the evolving capacity of the child and the impact of the outcome on the child’s life.¹⁰⁰ Similarly, the Inter-American Commission on Human Rights (“IACHR”) argues that age should not be regarded as an obstacle to ensuring the rights of children to be heard.¹⁰¹ Furthermore, in accordance to Article 12 of the UNCRC, Article 19 of the American Convention gives rise to additional obligations for Member States of the Convention

⁹⁷ UN Committee on the Rights of the Child (UNCRC), *General Comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, UN Doc CRC/C/GC/12 para 19.

⁹⁸ Para 20.

⁹⁹ Para 21.

¹⁰⁰ Para 30.

¹⁰¹ Inter-American Commission on Human Rights (2017) IACHR 124.

in relation to regulating appropriate mechanisms for children to effectively participate without discrimination, while taking the child's evolving capacities and the principle of progressive autonomy into consideration.¹⁰² The principle of progressive autonomy recognises that children, who are subjects of rights, can progressively exercise and assert rights for themselves as they acquire more abilities and capabilities in line with their evolving capacities, age and maturity, which moves beyond the notion that children are objects, merely relying on receiving assistance and care.¹⁰³

Article 4(2) of the ACRWC also provides for the right to be heard. Similar to the UNCRC, the provision lies at the centre of child participation rights. While the UNCRC states that the views expressed by children that are capable of forming their own views shall be heard, the ACRWC states that the views of children capable of communicating shall be heard.¹⁰⁴ Furthermore, the ACRWC states that the views of the child shall be heard in judicial and administrative proceedings, while the UNCRC provides for all matters concerning the child. The ACRWC further states that the views of the child shall be heard, while the UNCRC merely states that children shall express their views. Merely expressing one's views does not oblige others to listen to them. However, the UNCRC adds that due weight should be given to what the child is saying. On this point, the wording of the ACRWC is more clear.¹⁰⁵ Instead of saying that the child's age and maturity should be considered, the ACRWC states that the views of the child shall be taken into account in accordance with the provisions of appropriate law. However, the wording here can be regarded as a drawback due to the wide discretion given to Member States, which is often used as a justification for setting age as a limitation mechanism.¹⁰⁶

Furthermore, the IACHR emphasise the fact that for some children, such as young children or minority groups, it may be more difficult to exercise their right to participate

¹⁰² Inter-American Commission on Human Rights (2017) *IACHR* 124.

¹⁰³ Inter-American Commission on Human Rights (2017) *IACHR* 131.

¹⁰⁴ Article 4(2) of the ACRWC states that:

"In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law".

Article 12 of the UNCRC states that:

"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child ..."

¹⁰⁵ Gose *The African Charter on the Rights and Welfare of the Child* (2002) 126.

¹⁰⁶ 127.

as a result of obstacles that may exist within legal and social structures.¹⁰⁷ Therefore, the duty to identify children that might need special protection, is crucial.

3 4 3 2 *Gillick v West Norfolk and Wisbech Area Health Authority*

Age is often used as a yardstick to measure how much autonomy the child should bear, and is often not that accurate. In a ground-breaking judgment by Lord Fraser in *Gillick v West Norfolk and Wisbech Area Health Authority* (“*Gillick*”), guidelines were given as to when the child would reach competence to make autonomous decisions. These are more commonly known as the “Gillick competence” test.¹⁰⁸ The court had to decide whether medical practitioners could give contraceptives and advice on the use thereof to children under the age of 16, without parental consent.¹⁰⁹ The case has been used in various ways to determine whether a child has the competency or maturity to give informed consent without the consent of parents. The House of Lords held that in order to establish if a child has the necessary capacity to consent, their maturity, understanding and the nature of the consent are important factors to consider rather than following a narrow approach that only takes age into consideration.¹¹⁰ Further, the child should be able to make a reasonable assessment of the advantages and disadvantages of the treatment, so that it would constitute “true consent”.¹¹¹ The House of Lords has given meaning to the concept of Gillick competence attaching the notion that as children grow into adulthood, they become individuals with increased intelligence, competence and autonomy.¹¹² However, no guidelines were given as to when a child reaches Gillick competence. Legal commentators have since assumed that the child gains this competence during adolescence, varying between the ages of

¹⁰⁷ Inter-American Commission on Human Rights (2017) *IACHR* 125.

¹⁰⁸ *Gillick v West Norfolk & Wisbeck Area Health Authority and Department of Health and Social Security* 1986 AC 112.

¹⁰⁹ Para 9.

¹¹⁰ Para 581.

¹¹¹ “[W]hether or not a child is capable of giving the necessary consent will depend on the child’s maturity and understanding and the nature of the consent required. The child must be capable of making a reasonable assessment of the advantages and disadvantages of the treatment proposed, so the consent, if given, can be properly and fairly described as true consent.” See *Gillick v West Norfolk and Wisbeck Area Health Authority and Department of Health and Social Security* 1986 AC 112 para 581.

¹¹² New South Wales Law Reform Commission *Report 119: Young People and Consent to Health Care* (2008). See also C Murley “Does the Gillick Competency Test Apply in New Zealand, Given the special nature of sexual health care services?” (2013) www.nzlii.org <<https://bit.ly/30Vq4kv>> (accessed 08-07-2018).

14 and 15. Freeman, however, argues that there is an increased amount of evidence suggesting that Gillick competence is achieved much earlier.¹¹³

Determining the child's decision-making competence does not simply arrive at the occurrence of puberty.¹¹⁴ Lord Scarman highlights that legal competence to make decisions is conditional on the child gradually acquiring two things.¹¹⁵ The first is maturity, which takes the child's experiences into account, and the child's ability to manage influences on decision-making, such as peer pressure, family pressure, and fear. The second aspect is intelligence, which takes the child's understanding of the treatment into account and the child's ability to weigh the risks and benefits, the long-term factors of the decision, and the effect on family life and schooling.¹¹⁶

Determining the degree of maturity and intelligence needed to make a decision will depend on the scope and impact of the decision. By using the child's maturity and intelligence to determine their competence to make decisions, the court in *Gillick* illustrated a clear rejection of the status-based approach where age is used to determine rights. The court emphasised that children mature and develop gradually and that it does not occur homogeneously – children do not gain full competence at a specific time or at a specific age.¹¹⁷ Rather, competence to make effective decisions will come with growing maturity and experiences. A child may be considered competent to make an autonomous decision in some areas but not others. Establishing competence is therefore case-specific and will depend on the particular abilities of the individual child.

3 4 4 The right to development

A right that is parallel to the right to autonomy and the best interests of the child is the child's right to development. The UNCRC and the ACRWC conjoin the child's right to development with their right to life and survival. The right to life and survival are fundamental preconditions for the realisation and enjoyment of any other rights

¹¹³ Freeman "The Value and Values of Children's Rights" in *The Human Rights of Children: From Visions to Implementation* 30.

¹¹⁴ K McLean "Children and competence to consent: Gillick guiding medical treatment in New Zealand" (2000) 31 *Victoria U Wellington L Rev* 551 556.

¹¹⁵ 556.

¹¹⁶ R Griffith "What is Gillick Competence?" (2015) 12 *Hum Vaccin Immunother* 244–247. See also McLean (2000) *Victoria U Wellington L Rev* 557.

¹¹⁷ McLean (2000) *Victoria U Wellington L Rev* 557.

protected in the documents.¹¹⁸ Article 5 of the ACRWC and Article 6 of the UNCRC both state that every child has the right to life and places the duty on Member States to ensure “to the maximum extent possible” the survival and development of the child. The right to survival captures “the right to life in both its civil and political as well as its social, economic and cultural aspects”.¹¹⁹ Whereas the right to development encapsulates the right of individuals or groups “to participate in, and contribute to, and enjoy continuous economic, social, political and cultural development in which all human rights can be realised”,¹²⁰ the right to development is inalienable and provokes the concept of equality and distributive justice for all.¹²¹ Therefore, the right forms the cornerstone of an individual’s fundamental freedoms. In General Comment 5 the Committee highlighted that the right to development is a holistic concept that embraces the physical, mental, social, spiritual, and moral capabilities of the child, and the implementation of the right to development should be aimed at achieving the optimal development of the child”.¹²² Furthermore, the Committee recognises the child’s need for change across all stages of their development, which should be implemented alongside their ability to autonomously exercise their rights.¹²³

The right to development integrates aspects of human rights, requires active and meaningful participation, and it embodies the human rights principles of non-discrimination, equality, and freedom, while also implying self-determination. The Oxford dictionary defines *self-determination* as the process by which individuals controls their own life.¹²⁴ The right to self-determination might not be specifically mentioned in the UNCRC or the ACRWC, but it can be interpreted from other provisions, such as the right to autonomy, freedom of expression, association, freedom of thought, the right to identity, the right to development and the best interests of the child principle.

¹¹⁸ T Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009) 119.

¹¹⁹ 120.

¹²⁰ 120.

¹²¹ 121.

¹²² UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, available at: <<https://www.refworld.org/docid/4538834f11.html>> (accessed 29 November 2019). See also Inter-American Commission on Human Rights (2017) *IACHR* 110.

¹²³ See Inter-American Commission on Human Rights (2017) *IACHR* 111

¹²⁴ Oxford Dictionary “Self-determination” <<https://en.oxforddictionaries.com/definition/us/self-determination>>.

The right to development further includes the fostering of the many dimensions of the child.¹²⁵ Article 11 of the ACRWC states that the child has a right to education and to develop their personality, talents, and mental and physical abilities to their fullest potential. The provision further clarifies that this should be done in a way that would include the preservation and strengthening of African morals, traditional values and cultures.¹²⁶

Furthermore, Article 18 of the UNCRC and Article 20 of the ACRWC places an obligation on Member States and parents to ensure the upbringing and development of the child. The obligation forms part of the primary responsibilities of the parents, with Member States having to hold parents accountable.¹²⁷ Therefore, by fulfilling their primary obligation, parents will ensure that the child's right to identity, autonomy, freedom of association and expression are realised and respected, while respecting the best interests of the child. Further support for this argument comes from Article 27 of the UNCRC that obligates parents, again, to ensure that the child's physical, mental, social, spiritual, and moral capabilities are adequately developed.¹²⁸ However, it is submitted that, before Member States can hold parents accountable to fulfil their primary obligation, Member States should fulfil their own obligation to eliminate harmful social and cultural practices affecting the child's welfare, dignity, growth, and development and should, therefore, promote and protect the fundamental rights of all children.

Thus, it is evident that the right to development does not only include the physical needs of the child, but in its all-encompassing nature, the right to development emphasises the need to provide the child with a full and harmonious opportunity to

¹²⁵ Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* 121. This approach is concretised in the ACRWC's substantive and procedural provisions. See arts 11, 12, 25 and 13 of the ACRWC and arts 6, 18, 27 and 30 of the UNCRC.

¹²⁶ A discussion of "African moral, tradition values and cultures" will follow below under 3.4.5 with the aim of contextualising the position of a right to gender identity under the African regional system.

¹²⁷ Article 18 reads:

"1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern ..."

Article 20 states that:

"1. Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development of the child ..."

¹²⁸ Article 27 reads:

"1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development".

develop their personality, and a focus on their spiritual, moral, and social growth.¹²⁹ Therefore, all children have the right to grow and develop on an equal basis. Member States should respect and ensure the rights set forth in the UNCRC and the ACRWC to all children without discrimination, which indicates that Member States: (i) has a duty to identify children who might be at risk where the enjoyment of these rights are concerned; and (ii) should adopt protective measures while also promoting the rights of these children on an equal basis with other children.¹³⁰

3 4 5 The right to gender identity

In considering the rights identified above, it is evident that there is a duty in terms of the UNCRC and the ACRWC to protect and promote the child's best interests and their rights to autonomy and development. The aim of the following discussion is to establish a right to gender identity for transgender children as an obligation on the South African State by considering the interrelatedness of the international legal framework. As a point of departure, the UN system will be evaluated in relation to establishing gender identity as a prohibited ground of discrimination followed by an evaluation of Article 8 of the UNCRC which provides for the child's right to an identity. Secondly, the African regional system will be discussed with particular focus on determining if gender identity could indeed be included under the non-discrimination clauses, while these documents often rely on upholding "African moral, tradition values and cultures" as a barrier to recognising gender identity as a right. As a matter of adding persuasive and interpretive value to the discussion, the Inter-American systems approach to establishing gender identity as a right under non-discrimination clauses will be gauged, as well as the European systems approach to relating gender identity to the right to privacy.

The application of international law is guided by the principles of universality and non-discrimination.¹³¹ The right to non-discrimination functions as the core to human rights principle enshrined in the Charter of the United Nations, the Universal Declaration of Human Rights, and other core human rights treaties such as the

¹²⁹ Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* 121. See also Preamble of the UNCRC and Preamble of the ACRWC.

¹³⁰ Inter-American Commission on Human Rights (2017) *IACHR* 112.

¹³¹ UN Human Rights Council "Report of the United Nations High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity" (2011) A/HRC/19/41 4.

UNCRC. Article 2 of the UNCRC places a duty on all Member States to respect and ensure the rights enshrined therein to each child within their jurisdiction without discrimination of any kind, irrespective of the child's "race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status".¹³² Although this provision does not mention "gender", the possible grounds for discrimination is intentionally open-ended as a result of the reference to discrimination based on "other status".¹³³ The annual report of the United Nations Human Rights Committee ("UNHRC") and General Comment 15 by the Committee serves as validation for this interpretation.¹³⁴ Considering the *ejusdem generis* doctrine, the Committee found that gender identity could be included, as it stems from "the same kind" as the other grounds mentioned in Article 2. Further support for this interpretation derives from the Committee on Economic, Social and Cultural Rights' General Committee, which emphasises that the so-called "other status" broadens the scope for adding further grounds of discrimination.¹³⁵ In addition, General Comment 20 of the United Nations Committee on Economic, Social and Cultural Rights ("CESCR") stipulate that gender identity is and should be recognised as a ground of discrimination.¹³⁶ The notion that gender identity must be recognised

¹³² Article 2 reads:

"1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members".

See also Bucataru (2016) *QMHR* 62.

¹³³ A/HRC/19/41 4.

¹³⁴ UN Committee on the Rights of the Child (UNCRC), Child General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24). See also A/HRC/19/41.

¹³⁵ Bucataru (2016) *QMHR* 64. Further, article 2 (2) of the ICESCR states that:

"The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." UN Committee on the Rights of the Child (UNCRC), General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24). See also UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, UN Doc E/C.12/GC/20.

¹³⁶ General Comment 20 states that:

"In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace".

as a prohibited ground of discrimination is further supported by the UNHRC in various reports to the UN High Commissioner for Human Rights. The UNHRC highlights that there are obligations on Member States to prevent violence and discrimination based on gender identity, which are founded on the duty to protect and promote the right to life, liberty and security of persons irrespective of their gender identity, the right to be free from inhuman and degrading treatment, the right to privacy, the right to freedom of expression and association, and finally, to protect individuals from discrimination on the ground of gender identity.¹³⁷

Gender identity is defined by the way in which an individual identifies themselves. This interpretation accords to the aim of the UNCRC as explained in its preamble which ensures that Member States fulfil their duties to empower and protect children, thus allowing them to “grow up in an environment and atmosphere of happiness, love and understanding”.¹³⁸ Based on the guidance provided by the UN bodies identified above, the right to identity can also be found in Article 8 of the UNCRC.¹³⁹

This provision starts by obligating Member States to respect the right of the child to preserve their identity. It states further that Member States shall provide appropriate assistance and protection where a child is illegally deprived of elements of their identity. This would aim to promptly re-establish the child’s identity.¹⁴⁰ Historically, the provision was first introduced as a result of child abductions that occurred in Argentina, which led to the children being deprived of their family ties and true identity.¹⁴¹

See UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, available at: <<https://www.refworld.org/docid/4a60961f2.html>> (accessed 26 November 2019).

¹³⁷ Articles 2, 3, 6, 8, 12, 16 and 19 of the UNCRC. See also UN Human Rights Council, *Human rights, sexual orientation and gender identity : resolution adopted by the Human Rights Council*, 2 October 2014, A/HRC/RES/27/32, available at: <<https://www.refworld.org/docid/55ed69214.html>> (accessed 3 December 2019), UN Human Rights Council, *Protection against violence and discrimination based on sexual orientation and gender identity : resolution / adopted by the Human Rights Council*, 15 July 2016, A/HRC/RES/32/2, available at: <<https://www.refworld.org/docid/57e3d9934.html>> (accessed 3 December 2019) and A/HRC/19/41.

¹³⁸ Bucataru (2016) *QMHR* 64. See Preamble of the UNCRC.

¹³⁹ Article 8 of the UNCRC states that:

“1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity”.

¹⁴⁰ Article 8 of the UNCRC.

¹⁴¹ Bucataru (2016) *QMHR* 63.

Prima facie Article 8 does not include gender identity. However, the provision does include a non-exhaustive list with a reference to identity by using the word “including”, which allows for a broader interpretation.¹⁴² Additionally, refusing to acknowledge that gender identity should be regarded as a ground for protection against discrimination or abuse, does not align with the evolving nature of society and the purpose of the UNCRC.¹⁴³ The right to identity for children cannot be confined to their nationality, name and family relation in today’s context. Identity forms part of the core of what it means to be considered a separate and unique person. A broad and unrestricted interpretation of Article 8 of the UNCRC coincides with the aim and purpose of the Convention and with other international and regional documents, which provides the right to non-discrimination and identity in relation to legal gender recognition.¹⁴⁴ In a broad sense, the identity of a person is commonly understood as everything comprising the person’s feeling of self that differentiates the person from others. Thus, in a natural sense gender identity would be part of the right to identity.¹⁴⁵

The Committee has not explicitly mentioned that gender identity could be included under Article 8 of the UNCRC, but in General Comment 14 the child’s identity is mentioned as an element that should be considered when assessing the child’s best interests in terms of Article 3, which fosters the protection and promotion of children’s rights and considers the diversity of all children.¹⁴⁶ However, in the context of General Comment 14, gender identity has been defined as characteristics such as sex, sexual orientation, and personality. Even though gender identity is not explicitly mentioned, there should be no reason as to not include it here. The literature on children’s rights often mention sexual orientation and gender as aspects covered by Article 8 of the

¹⁴² J Doek *A Commentary on the United Nations Convention on the Rights of the Child*, Article 8 The Right to Preservation of Identity Article 9 The Right Not to Be Separated from His or Her Parents (2006) 8. See also Bucataru (2016) *QMHR* 63.

¹⁴³ Bucataru (2016) *QMHR* 63.

¹⁴⁴ 63.

¹⁴⁵ Sandberg (2015) *Nordic Journal of Human Rights* 337 343.

¹⁴⁶ UNCRC (2016) General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc CRC/C/GC/14 para 55:

“The identity of the child includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality. Although children and young people share basic universal needs, the expression of those needs depends on a wide range of personal, physical, social and cultural aspects, including their evolving capacities. The right of the child to preserve his or her identity is guaranteed by the Convention (art 8) and must be respected and taken into consideration in the assessment of the child’s best interests”.

See also Sandberg (2015) *Nordic Journal of Human Rights* 343.

UNCRC, which indicates that transgender children have the exact same rights to their identity as cisgendered children.¹⁴⁷

Furthermore, Article 8 of the UNCRC provides a child with the right to preserve their identity. The question that arises in this context is whether this excludes the right to have the physical expression of one's gender identity changed since a change of gender could be considered contrary to preservation. Sandberg argues that since the mental gender identity has already been established when the physical change was sought, it can be seen as preserving the child's gender identity, especially if the physical change would be necessary for the child to conform to their mental gender.¹⁴⁸ It is therefore submitted that the right to express one's physical gender falls within the scope of the preservation of identity. In General Comment 14, the Committee emphasises that children are not homogenous, and that diversity should always be considered when assessing the best interests of the child.¹⁴⁹

Unlike the UNCRC, the ACRWC does not provide for the right to identity. The reason for this omission is not clear since the inclusion of identity would have been in accordance with the Charter as a whole through focusing on the African child's identity. However, Article 31 UNCRC(d) and (f) of the ACRWC states that the child shall strengthen and preserve social and national solidarity, African cultures and values and promote African unity, while Article 27(2) of the African Charter refers to the fact that the rights and freedoms of every individual shall be exercised with due regards to the rights of others, morality and common interest.

It could be argued that being transgender is contrary to African morals and cultures, as is evident from most African countries' laws that refuse to recognise LGBTQI rights, despite these laws being inherited from the colonial era.¹⁵⁰ It is however submitted that the wording of these Articles are derogatory, insular, prejudice and narrow in that it excludes differences. The duty to "preserve" consist of an obligation not to tamper with

¹⁴⁷ Sandberg (2015) *Nordic Journal of Human Rights* 343. See also Hodgkin & Newell "Implementation Handbook for the Convention on the Rights of the Child" CD-ROM (UNICEF, 2007) 115; M Jones "Adolescent Gender Identity and the Courts" in M Freeman (ed) *Children's Health and Children's Rights* (2006) 121, 148, 129.

¹⁴⁸ Sandberg (2015) *Nordic Journal of Human Rights* 343.

¹⁴⁹ UNCRC (2016) General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc CRC/C/GC/14 para 55.

¹⁵⁰ A Ibrahim "LGBT Rights in Africa and the Discursive Role of International Human Rights Law" (2015) 15 *Afr Hum RTS LJ* 263–281.

the status quo and conserving the accepted position.¹⁵¹ It aims to promote a sense of sameness which is in contradiction to the rest of the ACRWC and the African Charter. This contradiction can be observed from Article 1 of the ACRWC's emphasises that any cultural or religious practices that do not accord to the Charter, shall be discouraged. In considering the child's established rights, cultural values and religious practices cannot be used as an excuse or justification to deny children their rights and freedoms.

Article 31 of the ACRWC and 27(2) of the African Charter can both be interpreted as being discriminatory towards transgender children, which further contradicts the right to identity, expression, association, freedom of thought and non-discrimination. This non-inclusivity can be illustrated from the prejudicial cultural values that does not accept people of difference. However, even though Article 27(2) of the African Charter can be viewed as a limitation of rights, Murray argues otherwise.¹⁵² The African Commission on Human and Peoples' Rights ("African Commission") has stated that any restriction on rights may not have the consequence of making the right redundant.¹⁵³ Interestingly, where States have attempted to use Article 27(2) to limit rights, the African Commission and the African Court on Human and Peoples' Rights ("African Court") instead utilised the article to incorporate mechanisms and procedures employed in other regional and international systems into the African Charter.¹⁵⁴ In giving effect to the principles of universality and non-discrimination, the rights in the African Charter should be exercised with due regards to the rights of others, which requires that any limitation of rights should not be discriminatory.¹⁵⁵

The duty to respect, protect and promote the child's right to non-discrimination under the African system is provided for in terms of Article 2 and 3 of the African Charter, which provides that every person shall be entitled to the enjoyment of the

¹⁵¹ Sloth Nielsen and Mezmur "A Dutiful Child: The implications of Article 31 of the African Children's Charter" *Journal of African law* 52(2) 180.

¹⁵² Murray *The African Charter on Human And Peoples' Rights: A Commentary* (2019) 582.

¹⁵³ *Media Rights Agenda and Others v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. Nos. 105/93, 128/94, 130/94 and 152/96 (1998) para 68 and 69 available at: <http://hrlibrary.umn.edu/africa/comcases/105-93_128-94_130-94_152-96.html>. See also Murray *The African Charter on Human and Peoples' Rights: A Commentary* 582.

¹⁵⁴ Murray *The African Charter on Human and Peoples' Rights: A Commentary* 582.

¹⁵⁵ Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria, African Commission on Human and Peoples' Rights, Comm Nos. 140/94, 141/94, 145/95 (1999) para 41 available at: <<http://hrlibrary.umn.edu/africa/comcases/140-94.html>>. See also African Court on Human and Peoples' Rights, In the Related Matter of Lohé Issa Konaté v Burkina Faso, App. No. 004/2013, Judgment on the Merits, 5 December 2014, para 153. See further Murray *The African Charter on Human And Peoples' Rights: A Commentary* 583.

rights and freedoms guaranteed in the Charter without distinction of any kind.¹⁵⁶ Article 3 of ACRWC adopts a similar approach as the African Charter, but does however relate the right to children by providing that:

“Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child’s or his/her parents’ or legal guardians’ race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status”.

The fact both documents provide a right to non-discrimination which requires that everyone should be entitled to the enjoyment of rights and freedoms, is indicative of, and confirms, the fact that the abovementioned duties to uphold African values, morals and cultures can in actuality be limited by other rights and freedoms. This argument is further supported by the inclusion of the child’s right to non-discrimination irrespective of their own or their parents’ ethnic group, religion, political, and national and social origin, which are all elements of values, morals and culture. Furthermore, Article 11 of the ACRWC allows the child the right to develop their own personality and Article 5 states that the child has the right to social development, which would be harmonious with the document as a whole.¹⁵⁷ Article 21 of the ACRWC places a duty on Member States to eliminate harmful social and cultural practices affecting the child’s welfare, dignity, normal growth and development. The provision furthermore emphasises that this especially relates to discriminatory customs and practices aimed at the child on the grounds of sex and any other status.

The question of including gender identity under these non-discrimination clauses does however remain. The African Charter and the ACRWC does not explicitly include gender or gender identity under the non-discrimination clauses, but does provide an open-ended provision through the inclusion of “or other status”, which is similar to the

¹⁵⁶ Article 2 of the African Charter states that:

“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”.

Article 3 of the African Charter states that:

“Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law”.

¹⁵⁷ Article 3 grants children the right to freedom, regardless of their sex or other opinions or status. Article 4 states that children can voice their own opinions. To say that being transgender does not fit in with African morals would make these sections redundant.

non-discrimination clauses identified above.¹⁵⁸ However, implementing the same argument to include gender identity followed by the UN system, the Inter-American and European system within the African system proves problematic. According to Murray, this is in part due to the lack of communications relating to the topic before the African Commission and African Court, as well as the sensitivity surrounding the issue within the African continent.¹⁵⁹ Nevertheless, in 2014 the African Commission addressed the right to be free from discrimination based on gender identity in its Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity ("Resolution 275"), and referred directly to Articles 2, 3, 4, and 5 of the African Charter.¹⁶⁰ In Resolution 275 the African Commission called on Member States to enact and effectively apply appropriate laws that prohibits all forms of violence on the basis of gender identities, which, suggests that the African Commission accepts that violence on the basis of gender identity does amount to discrimination and violates fundamental rights.¹⁶¹ Rudman, however, holds that this deduction does not mean that the African Commission has accepted non-discrimination based on gender identity.¹⁶² Furthermore, although Resolution 275 addresses gender identity as a form of discrimination, the African Commission's caution has been criticised for affording no more protection than is already available in international and domestic law.¹⁶³

In this regard, an analysis of the Inter-American approach to gender identity as a ground of discrimination would add useful persuasive value based on the fact that the sources of law are very similar, since they are all anchored in the Universal Declaration of Human Rights.¹⁶⁴ Furthermore, in applying the ECHR, the contributions of the European Courts to the understanding of the protection of rights related to gender identity should also be considered.

¹⁵⁸ See heading 3 4 5.

¹⁵⁹ Murray *The African Charter on Human And Peoples' Rights: A Commentary* 65.

¹⁶⁰ Site articles and resolution 275. See also A Rudman "The protection against discrimination based on sexual orientation under the African human rights system" (2015) 15 *African Human Rights Law Journal* 23, and Ibrahim (2015) 15 *Afr Hum RTS LJ* 277.

¹⁶¹ Rudman (2015) 15 *African Human Rights Law Journal* 23.

¹⁶² 24.

¹⁶³ Ibrahim (2015) 15 *Afr Hum RTS LJ* 277. See also Murray *The African Charter on Human And Peoples' Rights: A Commentary* 66.

¹⁶⁴ Rudman (2015) 15 *African Human Rights Law Journal* 13.

The American Declaration and the American Convention were both inspired by the notion that everyone is born free and equal, in dignity and in rights.¹⁶⁵ In relation to the foregoing, Article 1 of the American Convention on Human Rights states that:

“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color [sic], sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”.¹⁶⁶

Like the documents discussed above, the American Convention does not explicitly mention gender identity. The IACHR has, however, noted that the non-discrimination obligation requires Member States to identify individual or groups of children whose rights may demand special protection measures. One such group was identified by the Inter-American Court on Human Rights, who highlighted the discrimination and social exclusion experienced by transgender children.¹⁶⁷ Furthermore, in 2016, Costa Rica applied for guidance from the Inter-American Court in order to establish if gender identity is protected under Article 1 and Article 24 of the American Convention.¹⁶⁸ The Court acknowledged that gender identity is a category that is protected under the

¹⁶⁵ Similar provisions are observed under Article 1 of the Universal Declaration of Human Rights. See Inter-American Commission on Human Rights (2017) *IACHR* 114.

¹⁶⁶ It is worth noting that the non-discrimination clause provides for similar grounds as both the African Charter and the ACRWC.

¹⁶⁷ IACHR “Violence against LGBTI Persons” (2015). IACHR, press releases, “On Trans Day of Visibility, IACHR Urges States to Ensure Full Inclusion of Trans People and Combat the Factors that Exacerbate Discrimination and Exclusion”. See also OAS “IACHR Expresses Concern over Recent Violent Attacks against LGBTI People in the Americas” (2019) [oas.org <http://www.oas.org/en/iachr/media_center/PReleases/2019/065.asp>](http://www.oas.org/en/iachr/media_center/PReleases/2019/065.asp) (accessed 20-11-2019). See further Inter-American Commission on Human Rights (2017) *IACHR* 118.

¹⁶⁸ The Court was asked to consider five questions:

“(i) Considering that gender identity is protected by articles 1 and 24 of the Convention, in addition to the operation of articles 11.2 and 18 of the Convention, should States recognise and facilitate the name change of persons in accordance with their self-affirmed gender identity? (ii) If so, is it against the Convention for there not to be an administrative process in place to accommodate the change of name? (iii) Should article 54 of the Civil Code of Costa Rica (Law No 68 of 28 September 1887) (Costa Rican Code) be interpreted, in accordance with the Convention, to be optional to persons wishing to change their name in accordance with their self-affirmed gender identity, and should there be a free, accessible and efficient administrative process for those persons? (iv) Considering that non-discrimination based on sexual orientation is a protected category under articles 1, 11.2 and 24 of the Convention, are States obliged to recognise all legal rights deriving from a same-sex union? (v) If so, should there be a legal institution to regulate same-sex unions in order for States to recognise all legal rights deriving from their relationship?”.

See Human Rights Law Centre “The Inter-American Court of Human Rights calls for the recognition and protection of LGBTI rights” (2018) [hrlc.org.au <https://www.hrlc.org.au/human-rights-case-summaries/2018/5/14/the-inter-american-court-of-human-rights-calls-for-the-recognition-and-protection-of-lgbti-rights>](https://www.hrlc.org.au/human-rights-case-summaries/2018/5/14/the-inter-american-court-of-human-rights-calls-for-the-recognition-and-protection-of-lgbti-rights) (accessed 09_11-2019).

American Convention on Human Rights' guarantees under the right to equality and non-discrimination.¹⁶⁹ The Court also based its findings on the fact that gender identity is protected under Articles 3 (right to recognition of judicial personality), 11(2) (right to privacy), 7 coupled with 11(2) (right to free development of personality) and 18 (right to a name) of the American Convention.¹⁷⁰ The Court observed gender identity as:

“[T]he internal and individual experience of gender as each person feels it, which may or may not correspond to the sex assigned at birth... and [is] based on the construction of a self-perceived gender identity dependent on the free development of the personality, sexual self-determination, and the right to privacy. Consequently, those who decide to assume this self-perceived gender identity, are the holders of legally protected interests which cannot be subject to any restriction based merely on the fact that society as a whole does not share specific singular lifestyles, due to fears, stereotypes, and social and moral prejudices which have no reasonable basis”.

Therefore, the Court views gender identity as one's self-perceived construction that accords to the above-mentioned established protections rights.¹⁷¹ The Inter-American Court established that the American Convention on Human Rights protect the rights of transgender individuals on an equal footing as any other person, while recognising their right to legal gender recognition based on self-determination.¹⁷² Therefore, the Court established that gender identity is a category protected by the convention's equality and non-discrimination clause.¹⁷³

¹⁶⁹ Advisory Opinion on Gender Identity, Equality, and Non-Discrimination of Same-Sex Couples, (2017), OC-24/17.

¹⁷⁰ Advisory Opinion on Gender Identity, Equality, and Non-Discrimination of Same-Sex Couples, (2017), OC-24/17.

¹⁷¹ See heading 3 4 5.

¹⁷² Jorge “The Inter-American Court of Human Rights' Advisory Opinion on Gender Identity and Same-Sex Marriage” (2018) 22(9) American Society of International Law available at: <<https://www.asil.org/insights/volume/22/issue/9/inter-american-court-human-rights-advisory-opinion-gender-identity-and>>. See headings 4 2 2, 4 3 and 4 4 for a discussion on the aspects of self-determination and the implementation mechanisms. See also I/A Court H.R., Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights). Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24.

¹⁷³ Advisory Opinion on Gender Identity, Equality, and Non-Discrimination of Same-Sex Couples, (2017), OC-24/17.

In terms of the European system, the ECHR protects the human rights of every person in Member States of the Council of Europe.¹⁷⁴ Article 8 of the ECHR states that:

- “1. Everyone has the right to respect for his [sic] private and family life, his [sic] home and his [sic] correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

In *Van Oosterwijck v Belgium* the applicant, a Belgian citizen, applied to have his civil status certificate ratified to reflect his preferred gender marker after undergoing a medical transition.¹⁷⁵ However, both the Brussels Court of First Instance and the Brussels Court of Appeal, denied his application, since the applicant could not prove that there had been an error on the initial record of his gender. Hereafter, the applicant submitted an application to the European Commission, wherein he alleged that his rights had been violated, which amounted to degrading and inhuman treatment or punishment (Article 3 of the ECHR), to respect his private life (Article 8 of the ECHR), and the right to marry and to found a family (Article 12 of the ECHR). Unanimously, the European Commission confirmed a violation of the applicant’s rights in terms of the abovementioned provisions. Further, the Commission held that Article 8 encompasses the right to respect an individual’s preferred gender while acknowledging that the right to legal gender recognition is “an intrinsic, inseparable part of a person’s status and is thus a general principle of law”.¹⁷⁶

Repeatedly, the ECtHR has ruled on gender identity recognition, strengthening the human rights of transgender individuals, such as the right to privacy and the right to not be subjected to discrimination.¹⁷⁷ In *Goodwin v United Kingdom*, the applicant claimed that she had been discriminated against and experienced sexual harassment

¹⁷⁴ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

¹⁷⁵ *Van Oosterwijck v Belgium* 1980 3 ECHR 557.

¹⁷⁶ *Van Oosterwijck v Belgium* 1980 3 ECHR 557. See also Report to the Minister for Employment Affairs and Social Protection “Review of the Gender Recognition Act 2015” *Department of Employment Affairs and Social Protection* 9. See also G Niveau “Human Rights Aspects of Transsexualism” (2000) 4 *Health and Human Rights Journal* 143–144.

¹⁷⁷ Köhler & Erth “Legal Gender Recognition in Europe” *TGEU* 8.

in the workplace following her medical transition. Further, the applicant alleged that the fact that she was not able to rectify her preferred gender in official identification documents, exposed her to further embarrassment and humiliation.¹⁷⁸ The ECtHR ruled that the persistent refusal of gender recognition was “no longer suitable” since it constituted an infringement of Article 8.¹⁷⁹

Based on the analyses above, that there is enough evidence to be able to assert a right to gender identity as a ground of discrimination based on gender identity. Rudman argues that is “impossible to fathom” as to why the African Commission deviates from the abovementioned established norms. In terms of the UN system there is a clear obligation on South Africa to extend the right to gender identity to transgender children based on self-determination. It is submitted that, although this duty has not been explicitly established under the African system, it in no way takes away from the existing duty to respect, protect and promote other fundamental right, which, if effectively applied, should include the recognition of gender identity.

If Member States are to ensure to the highest degree possible the child’s best interests and rights to autonomy, development, identity and non-discrimination, it would imply that transgender children do have the right to their gender identity, which would naturally give effect to their right to be happy, loved, and understood, while also fostering and nurturing the many dimensions of the child’s rights in terms of international law.

3 5 Rights contained in the Yogyakarta Principles¹⁸⁰

3 5 1 Introduction and the status of the Yogyakarta Principles

The Yogyakarta Principles were presented in 2007 by a coalition of international human rights organisations at the UN in New York and Geneva. A group of experts consisting of lawyers, scholars, domestic activists and international professionals, UN-affiliated and non-governmental organisation (NGO) leaders, who gathered in Yogyakarta, Indonesia in 2006, drafted the Yogyakarta Principles.¹⁸¹ The Principles

¹⁷⁸ *Goodwin v United Kingdom* 2002 ECHR 588.

¹⁷⁹ Para 90. Further, in *B. v. France*, 25 March 1992 (Application no. 57/1990/248/319) the court stated that “[t]he lack of any legal recognition of the gender identity of a trans woman who had undergone genital surgery violated her right to respect for private life (Art. 8 of the European Convention on Human Rights/ECHR).”

¹⁸⁰ See Annexure A of this thesis for the Yogyakarta Principles.

¹⁸¹ Justice Edwin Cameron represented South Africa as one of the experts who drafted the Yogyakarta Principles. See Annexure A of this thesis.

were published in response to the well-documented patterns of abuse aimed against the LGBTQI community.¹⁸²

Due to the evolving nature of the Principles, the Experts gathered in 2017, for the 10-year anniversary of the first drafting of the Yogyakarta Principles. An updated version of the Principles, the Yogyakarta Principles +10, was then released in response to human rights violations that were not adequately dealt with in the first version. Nine additional Principles were added to the document.¹⁸³

The Yogyakarta Principles are not binding law. However, they do represent authoritative interpretations of the international law as distilled from a number of international human rights treaties, which are binding on Member States.¹⁸⁴ As such, they constitute soft law. Whereas hard law is defined as being legally binding obligations, soft law, in contrast, is described as being deficient in creating legally binding obligations.¹⁸⁵ Guzman and Meyer define soft law as “nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn creates expectations about future conduct”.¹⁸⁶ The definition provided by Guzman and Meyer coincides with the aims of the Yogyakarta Principles. The Yogyakarta Principles were essentially drafted as a guiding mechanism and a point of departure when interpreting international law pertaining to individuals that do not conform to a binary gender system or individuals with diverse genders. Vollmer argues that, although the Principles are not legally binding, they hold persuasive value due to their use by human rights bodies, and for their inclusive interpretation of how sexual orientation, gender identity, gender expression and sex

¹⁸² Anonymous “An Activist’s Guide to the Yogyakarta Principles” (2010) *YP in Action* 40 <http://ypinaction.org/wp-content/uploads/2016/10/Activists_Guide_English_nov_14_2010.pdf>.

“A primary goal of this Guide is to encourage the promotion of the Yogyakarta Principles among policy makers and politicians, decision makers and the general population, as well as among human rights defenders and rights holders. Activists—particularly LGBTI activists but including the wider community of human rights activists—are to the forefront in this regard”.

¹⁸³ See Annexure A of this thesis.

¹⁸⁴ P Ettelbrick & AT Zerán “The Impact of the Yogyakarta Principles on International Human Rights Law Development: A Study of November 2007” (2010) *YP in Action* 11 <http://ypinaction.org/wp-content/uploads/2016/10/Yogyakarta_Principles_Impact_Tracking_Report.pdf> (accessed 08-07-2018).

¹⁸⁵ See KW Abbot & D Snidal “Hard and soft law in international governance” (2000) 54 *International Organization* 421 421. See also, DT Vollmer *Queer families: An analysis of non-heteronormative family rights under the African human rights system* LLD dissertation, Stellenbosch University (2017) 163.

¹⁸⁶ AT Guzman & TL Meyer “International soft law” (2010) 2 *Journal of Legal Analysis* 171 174. See also Vollmer *Queer families: An analysis of non-heteronormative family rights under the African human rights system* 164.

characteristics (“SOGIESC”) rights should be understood and implemented under international law.¹⁸⁷

Therefore, although the Yogyakarta Principles might be classified as soft law, it is submitted that this does not mean that it should not be taken into consideration when considering the application of the international treaties. The Yogyakarta Principles have been referred to by the United Nations Human Rights Council,¹⁸⁸ the CESCR¹⁸⁹, and the Inter-American Court of Human Rights.¹⁹⁰ Vollmer and Matthyse argue that the continued use of the Principles is indicative that it might progressively play a larger role in establishing LGBTQI rights under international human rights law, and ultimately diminish their status as soft law.¹⁹¹

3 5 2 Background and rationale

The Yogyakarta Principles are a statement of the status of current international laws pertaining to SOGIESC. It developed from a careful study of central human rights treaties and the UN’s interpretation of those treaties.¹⁹² The Principles aim to articulate Member States’ obligations to adopt measures in accordance with their legal responsibilities under the treaties as well as providing recommendations to all sectors of the international community. In clarifying the rights in the Yogyakarta Principles, it aims to assist Member States that are signatory to international treaties to successfully fulfil their duties.¹⁹³

The Yogyakarta Principles were developed for two purposes. Firstly, it provides an assessment of the current state of human rights law as applied to sexual minorities, and in particular, LGBTQI people. Human rights norms of universality and non-

¹⁸⁷ Vollmer *Queer families: An analysis of non-heteronormative family rights under the African human rights system* 161–163.

¹⁸⁸ UN Human Rights Council “Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment” (1 February 2013) A/HRC/22/53, para 38.

¹⁸⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, UN Doc E/C.12/GC/20.

¹⁹⁰ Advisory Opinion on Gender Identity, Equality, and Non-Discrimination of Same-Sex Couples, (2017), OC-24 / 17.

¹⁹¹ Vollmer *Queer families: An analysis of non-heteronormative family rights under the African human rights system* 166. See also GC Matthyse *The Right to Remain Married: Positioning Homosexual-transsexual Marriages Under The South African Marriage Act 25 of 1961* LLM thesis, UWC (2016) 48.

¹⁹² Mainly the ICCPR, the Covenant of Economic, Cultural and Social Rights, the Convention on the Elimination of Discrimination Against Woman and Children and the UNCRC. See Ettelbrick & Zerán “The Impact of the Yogyakarta Principles on International Human Rights Law Development: A Study of November 2007” *YP in Action* 2.

¹⁹³ Anonymous “An Activist’s Guide to the Yogyakarta Principles” *YP in Action* 22.

discrimination form the core of the Yogyakarta Principles.¹⁹⁴ It strives to highlight that no human being or group of human beings should be considered as falling outside of the clear and direct wording of the international treaties that form the foundation of international human rights law. Secondly, the Yogyakarta Principles intend to enhance LGBTQI activists' and advocates' capacity to challenge human rights violations faced by individuals based on their SOGIESC.¹⁹⁵

The Principles are worded to uphold the nature of human rights – it does not limit its application by speaking of particular groups but is inclusive in that the Principles apply to all people regardless of their SOGIESC. By doing this, the Principles abolish the need for categorising and labelling people, that is, following a status-based approach.¹⁹⁶ The Principles apply fully to children as it does to adults.¹⁹⁷ Primarily, the Principles speaks to Member States; therefore, Member States should strive to ensure its implementation. The reasoning behind this is that international law upholds duties and obligations that are largely directed at Member States, as illustrated above.¹⁹⁸

3 5 3 The applicable principles

Narrain identifies six conceptual advances that the Yogyakarta Principles enable. The Principles (i) emphasise the universality of rights; (ii) see sexual orientation and gender identity as coequal markers of discrimination; (iii) provide a conceptual understanding of the terms *sexual orientation* and *gender identity*; (iv) develop the right to recognition before the law; (v) move beyond zonal privacy; and (vi) address the need for protection from medical abuse.¹⁹⁹

The preamble of the Yogyakarta Principles states that all human beings are born free and equal in dignity and rights.²⁰⁰ It defines SOGIESC as an integral part of an individual's dignity and humanity, and states that it should not be regarded as a basis for discrimination or abuse. It stresses that human rights violations specifically

¹⁹⁴ Ettelbrick & Zerán "The Impact of the Yogyakarta Principles on International Human Rights Law Development: A Study of November 2007" *YP in Action* 4.

¹⁹⁵ 4.

¹⁹⁶ Anonymous "An Activist's Guide to the Yogyakarta Principles" *YP in Action* 23.

¹⁹⁷ 23.

¹⁹⁸ See heading 3 4.

¹⁹⁹ A Narrain "The Yogyakarta Principles on Sexual Orientation and Gender Identity: Six Conceptual Advances enabled by the Principles" (2006) *ARC International* <<http://arc-international.net/research-and-publications/new-arc-reports/the-yogyakarta-principles-on-sexual-orientation-and-gender-identity-six-conceptual-advances-enabled-by-the-principles/>> (accessed 09-10-2018).

²⁰⁰ The statement stems from Article 1 of the Universal Declaration of Human Rights.

targeted towards individuals who do not conform to societal or culturally approved gender norms “constitutes a global and entrenched pattern of concern”.²⁰¹ Further, the preamble emphasises the critical importance of collating State obligations under the existing international laws to protect and promote all human rights for all individuals on the basis of equality without discrimination. The Principles should be seen and used as an interpretive mechanism or tool of international law where the application of international law to SOGIESC is concerned, as it is an extension of international law which clarifies the duties of Member States.

The document comprises of 38 Principles, each consisting of a statement of international human rights law, its application to a given situation, and the proposed obligations of Member States to implement their legal duties in accordance to international law. The first three Principles recall the primordial significance of the universality of human rights, while emphasising the extent of discrimination targeted towards individuals of diverse SOGIESC and their commonly rendered invisibility within society and its legal structures.²⁰² Principles 1 to 3 set out the principle of the universality of human rights along with their application to all individuals without discrimination, and the recognition that all people are equal before the law.²⁰³ Principle 1 makes it clear that everyone is entitled to human rights irrespective of their SOGIESC. The need to include the principle of universality stems from the fact that it is still denied in many countries over the world, where the persecution or discrimination of a person based on their SOGIESC is still not seen as a violation of the principle of universality embodied in Article 1 of the Universal Declaration of Human Rights. Therefore, Principle 1 is the anchor of the Yogyakarta Principles in that it asserts these rights for LGBTQI people solely based on the claim that they are human beings entitled to the rights guaranteed to all humans under international human rights law.²⁰⁴

Principle 2 defines discrimination as any distinction, exclusion, or restriction based on SOGIESC which in effect would nullify their equality before the law.²⁰⁵ Principle 3

²⁰¹ See Annexure A of this thesis.

²⁰² O’Flaherty & Fisher “Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles” (2008) 8 *Human Rights Law Review* 207–248 228.

²⁰³ See Principles 1, 2 and 3 of Annexure A of this thesis.

²⁰⁴ Narrain “The Yogyakarta Principles on Sexual Orientation and Gender Identity: Six Conceptual Advances enabled by the Principles” *ARC International*.

²⁰⁵ See judgments of the European Court of Human Rights, such as: *Goodwin v United Kingdom* 2002 ECHR 588; *Van Oosterwijck v Belgium* 1980 3 ECHR 557. See also the judgment and advisory opinion of the Inter-American Court on Human Rights: *Karen Atala and Daughters v Chile* IACHR (23 July 2008)

states that persons with diverse SOGIESC shall enjoy legal capacities in all aspects of their lives.²⁰⁶ It should be highlighted that the principle further explicitly states that each person has the right to self-determination and that this right stems from the fact that gender identity is integral to their personality. Furthermore, it states that no person shall be forced to undergo medical or surgical procedures as a requirement for legal gender recognition.

Principles 4 to 6 address the right to life, the right to security of a person, and the right to privacy.²⁰⁷ Principle 5 states that everyone should be protected against violence or bodily harm. This principle is useful in the protection of all children, especially in protecting transgender children from being bullied in schools or in the private domain. If Principle 1 and 5 are read together, special programmes should be initiated to enhance the full enjoyment of human rights for all. For the purpose of this thesis, it is important to note that Principle 5 could further be linked to Principle 3, which calls for a shift from requiring a medical transition in order to achieve legal gender recognition, which could amount to bodily harm, especially if an individual is too young, or would choose to not have to undergo a medical transition.

Principle 6, reiterating Article 16 of the UNCRC, states that everyone has the right to privacy and protection against unlawful attacks on their honour and reputation. The right to privacy is normally understood as the right not to be interrupted in the peaceful enjoyment of one's home.²⁰⁸ The Yogyakarta Principles go beyond this understanding in that it expands the right to include "decisions and choices regarding both one's own

Ser L/Doc 22 Rev 1 and Advisory Opinion on Gender Identity, Equality, and Non-Discrimination of Same-Sex Couples, (2017), OC-24 / 17. See also Resolution 275 by the African Commission on Human and Peoples' Rights on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or Imputed Sexual Orientation or Gender Identity.

²⁰⁶ See Article 6 of the Universal Declaration of Human Rights, Article 8 of the UNCRC, Article 3 of the American Convention on Human Rights and Article 5 of the African Charter.

²⁰⁷ See Principles 4, 5 and 6 of Annexure A of this thesis. The international and regional instruments that provides the right to life are: Article 3 of the Universal Declaration of Human Rights, Article 6 of the UNCRC, Article 4 of the American Convention on Human Rights and Article 4 of the African Charter. The international and regional instruments that provides the right to security of a person can be observed from: Article 3 of the UNCRC, Article 19 of the American Convention on Human Rights and Article of the African Charter. See also Resolution 275 by the African Commission on Human and Peoples' Rights on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or Imputed Sexual Orientation or Gender Identity. In relation to the right to privacy, see: Article 12 of the Universal Declaration of Human Rights, Article 17 of the UNCRC, Article 8 of the European Charter on Human Rights, and Article 11 of the American Convention on Human Rights. See also *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, *Goodwin v United Kingdom* 2002 ECHR 588, *Kück v Germany* 2003 37 ECHR 51 and *Nicholas Toonen v. Australia*, 4 April 1994.

²⁰⁸ Narrain "The Yogyakarta Principles on Sexual Orientation and Gender Identity: Six Conceptual Advances enabled by the Principles" *ARC International*.

body and consensual sexual and other relations with others". Principles 6 shifts the focus away from a zonal privacy approach by including "decisional privacy" and "relational privacy" which links to the conceptual framework provided by the right to human dignity and autonomy. This approach to the right to privacy stems from jurisprudence in South Africa, India, and the USA.²⁰⁹

The new additional Principles, the Yogyakarta Principles +10, provide for the right to State protection, the right to legal recognition, the right to bodily and mental integrity, and the right to practise, protect, preserve, and revive cultural diversity.²¹⁰ Principle 30 provides that everyone, regardless of their SOGIESC, has the right to State protection from violence and discrimination, and suggests that Member States should prevent it from happening.²¹¹ Principle 31 grants everyone the right to legal recognition, and everyone has the right to birth certificates and identity documents, regardless of their gender identity.²¹² It also provides for changing gendered information in such documents. It should be highlighted that the Principle urges Member States to ensure that everyone can gain quick access to mechanisms that would allow for the change of gender in accordance with their self-defined gender identity, while also providing for a multiplicity of gender marker options. The wording of the Principle essentially provides children with the right to alter their gender on official documents since the Principle further stipulates that no criteria of age, medical, or psychological intervention shall be used as prerequisites to change a person's name, legal sex and gender. The Principle provides the child with unlimited autonomy, but due to the fact that the best interests of the child principle is a fundamental interpretive legal principle, a substantive right, and a rule of procedure, the child's best interests should always be the primary consideration in all matters concerning the child. As a result, an

²⁰⁹ See for example, Sachs J in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2002 2 SA 1 (CC) para 116. See also *Naz Foundation v NCT Delhi* 160 Delhi Law Times 277.

²¹⁰ See Principles 30, 31, 32 and 38 of Annexure A of this thesis.

²¹¹ Principle 30 states:

"Everyone, regardless of sexual orientation, gender identity, gender expression or sex characteristics, has the right to State protection from violence, discrimination and other harm, whether by government officials or by any individual or group".

See of Annexure A of this thesis.

²¹² Principle 31 states that:

"Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them".

See Annexure A of this thesis.

assessment of the child's best interests will serve a prerequisite standard. Principle 32 supports the right to bodily and mental integrity, autonomy, and self-determination. Principle 38 grants everyone the right to protect, preserve and revive cultures, traditions, languages and rituals, but unlike the ACRWC, the Principles add that everyone has the right to their own cultural diversity, which in itself is more expansively worded than the ACRWC.

3 5 4 An analysis of the Yogyakarta Principles

To reiterate, the Yogyakarta Principles aims to assist Member States to successfully fulfil their duties by providing guiding and authoritative interpretations of the international law as distilled from a number of international human rights treaties, which are binding on the Member States. Each Principle reflects the human rights challenges identified by the group of experts, as well as the precise application of international law to those challenges. The general guidelines highlighted in the Yogyakarta Principles, are to protect and promote human rights, regardless of gender identity, while also enhancing accountability mechanisms for perpetrators who violate such rights. Therefore, it may be observed that the Yogyakarta Principles take account of the manner in which international and regional committees and courts in their general comments and advisory opinions, as well as the theory of a rights-based approach, are informing a contemporary understanding of the Members States' implementation obligation.²¹³ Nevertheless, it is evident that the Yogyakarta expand on the rights found in international law treaties. This can be seen from the specific mentioning of gender identity as a ground for discrimination. No international document does this explicitly.²¹⁴ As illustrated above, gender identity can only be included within the scope of international documents by means of interpretation or by "reading in" through the open-ended wording of the documents.²¹⁵ Nonetheless, the Yogyakarta Principles reiterate provisions from international documents as well as General Comments of the UN Committees and other international bodies.

The Yogyakarta Principles have set the standard for the term "gender identity" for regional and international human rights mechanisms, while impacting on the

²¹³ M O'Flaherty & J Fisher "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles" (2008) 8 *Human Rights Law Review* 29.

²¹⁴ 29.

²¹⁵ See Heading 3 4.

international and judicial arenas. In 2007, the Yogyakarta Principles became the first instrument, in terms of international soft law, to define both sexual orientation and gender identity. This enunciated how rights could be violated on these two grounds.²¹⁶ It also introduced the notion of gender identity, which came from the persistent articulation of gender identity as a key concern by LGBTQI activists.²¹⁷

Many foreign jurisdictions have embraced the Yogyakarta Principles as a point of reference, including South Africa. The definitions provided by the Principles have been used in legislation such as the Argentinian Gender Identity Law²¹⁸ and the Maltese Gender Identity, Gender Expression and Sex Characteristics Act of 2015 (“GIGESC Act”).²¹⁹ It was also referred to as an international instrument in the High Court of India judgment of *Naz Foundation v NCT Delhi*;²²⁰ in *National Legal Services Authority v Union of India*, where the Supreme Court declared transgender people a third gender;²²¹ and recently in the High Court of South Africa.²²² However, there are jurisdictions that do not accept the Principles due to the extent of the obligations they require to be assumed.²²³ Other jurisdictions have accepted the Principles, but with caution, such the United Kingdom (“UK”). Although the UK welcomed the Principles, it simultaneously acknowledged that some of the Principles’ interpretive guidance exceeded the current acknowledged human rights in the UK, such as the use of medical requirements that are still a prerequisite to accessing legal gender recognition.²²⁴

To reiterate, although the Yogyakarta Principles are not legally binding, there are indications that the Principles have begun to advance beyond soft law towards being authoritative and binding legal principles.²²⁵ These are, the continued utilisation of the

²¹⁶ See heading 2.2.

²¹⁷ Brown (2010) 31 *Mich J Int'l L* 878.

²¹⁸ *Ley de Identidad de Género* (Gender Identity Law) of 2012. See Heading 4.3 for a discussion below.

²¹⁹ Gender Identity, Gender Expression and Sex Characteristics Act of 2015 (XI of 2015) (Cap. 540). See Heading 4.3 for a discussion below.

²²⁰ *Naz Foundation v NCT Delhi* 160 Delhi Law Times 277.

²²¹ *National Legal Services Authority v Union of India* AIR 2014 SC 1863.

²²² *September v Minister of Justice and Correctional Services* EC10/2016. In this unreported judgment, heard on 21 September 2019, the judge relied on the Yogyakarta Principles’ guidance in relation to the rights of SOGIESC prisoners.

²²³ Brown (2010) 31 *Mich J Int'l L* 875.

²²⁴ British Foreign and Commonwealth Office “An FCO Programme for Promoting the Human Rights of LGBT People” (2009) *Foreign and Commonwealth Office* <<http://www.fco.gov.uk/resources/en/pdf/3849543/human-rights-lgbt>> (accessed 09-08-2018). See also, Brown (2010) 31 *Mich J Int'l L* 875.

²²⁵ Vollmer *Queer families: An analysis of non-heteronormative family rights under the African human rights system* 166.

Principle by international human rights committees and councils, the use thereof in national legal frameworks, and courts of law. Therefore, it is submitted that the Yogyakarta Principles should indeed be considered by Member States, since, for the purpose of this thesis, it would be in line with the protection and promotion of transgender children's rights offered by international law.

3 6 Conclusion

International law strongly encourages that the child should live in an environment of love and understanding. This should be done in accordance with the evolving capacities of the child. Parents and the State should therefore not discriminate against transgender children since their rights should be acknowledged in accordance with their evolving capacities. This does not leave the child with unlimited freedom though: the UNCRC provides that parents should exercise their rights by providing appropriate direction and guidance. Although the UNCRC does not define "appropriate direction and guidance," this should always be determined keeping in mind the child's best interests as, in terms of the ACRWC and UNCRC, this is the primary concern of parents.

As analysed above, the child's right to development includes their physical and mental abilities, including the right to identity and self-determination. The aim of the UNCRC is to prepare the child to live an individual life in society. The only way to achieve this aim is to essentially enshrine and encourage the mindset of individuality and autonomy from childhood. However, the only way in which parents can act in the best interests of transgender children, is through the States' guidance in the form of legislation.

Ascribing age and other prerequisites to legislation makes it difficult for transgender children to access their rights and capabilities, especially in the case of legal gender recognition. Acknowledging the child's right to identity, as it should be interpreted, will provide the child with the means to gain self-determination. Once the child's right to self-determination is recognised, legal gender recognition will naturally follow, which would be in the child's best interests while preserving the child's identity and development.

International and regional law has had a significant influence on the promotion and protection of fundamental human rights. As illustrated above, most of the provisions

ascribe duties to Member States. It is thus the primary duty of Member States to ensure that everyone has access to the rights contained in the international documents and the treaties which Member States ratified. It is evident from the analyses above that there is a duty on Member States to respect, protect and promote the transgender child's well-established right to legal gender recognition under the UNCRC and ACRWC, which is well supported by the interpretations and guidance provided from the Yogyakarta Principles and other regional bodies. The next chapter will identify and discuss the foreign jurisdictions that have recognised children's right to legal gender recognition in order to determine if the application of such a right for children is practical in its application.

CHAPTER 4: A DOMESTIC PERSPECTIVE ON THE IMPLEMENTATION OF THE RIGHT OF TRANSGENDER CHILDREN TO LEGAL GENDER RECOGNITION

4 1 Introduction

In most countries, citizens must have official documentation, such as an identification document or a birth certificate, with the purpose of compiling and maintaining the population register. Without these documentation, basic participation in societal activities can become difficult. For many transgender people, the gendered information in these documents, like their name and gender marker not reflecting their true identity, can cause constant discomfort, distress, and trigger discriminatory practices.¹ For transgender children, their sense of self-agency can be harmed if schools, for example, do not acknowledge and respect their gender identity without their official identification document having been changed. As a result, this might lead to teachers and other students dead-naming them,² and to potential bullying and harassment. School diplomas and records displaying the child's old name therefore have the potential to cause future harm to the child.³

To reiterate, legal gender recognition is the official recognition of a person's gender identity in key documents and public registries. The aim of legal gender recognition legislation must be to protect an individual's rights to equal and dignified treatment, education, development and freedom while providing protection against maltreatment, abuse and degradation. As discussed in Chapter 3 of this thesis, the International and regional legal system sets out the fundamental human rights applicable to children, as well as a number of the rights that are particularly relevant when considering legal gender recognition for children.⁴ Similarly, the Yogyakarta Principles set out Principles pertaining to the application of international human rights in relation to gender identity.⁵ Principle 31 states that everyone should have the right to have their gender legally recognised and to obtain identity documents and birth certificates that reflect their

¹ R Köhler & J Erth "Legal Gender Recognition in Europe 2nd revised version" (2017) *TGEU* <https://tgeu.org/toolkit_legal_gender_recognition_in_europe/> 8 (accessed 30-05-2019).

² As explained in footnote 45 of Chapter 1, dead-naming is when a person uses the old name of a transgender individual intentionally.

³ Köhler & Erth "Legal Gender Recognition in Europe" *TGEU* 11.

⁴ Report to the Minister for Employment Affairs and Social Protection "Review of the Gender Recognition Act 2015" (19-07-2018) *Department of Employment Affairs and Social Protection* <<http://www.welfare.ie/en/downloads/GRA%20Review%20Report.pdf>> (accessed 19-07-2018). See Chapter 3 of this thesis.

⁵ See Annexure A of this thesis. See also Report to the Minister for Employment Affairs and Social Protection "Review of the Gender Recognition Act 2015" *Welfare*.

correct gender information, regardless of their SOGIESC. Further, it should be emphasised that the Principle requires Member States to ensure access to legal gender recognition through quick, accessible and transparent mechanisms, based on the applicant's self-determination. Thus, no eligibility criteria, such as "medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third-party opinion" shall be used as prerequisites to access legal gender recognition procedures.⁶

Legal gender recognition is key for transgender people to meaningfully participate in society.⁷ Following on the pertinent rights and fundamental freedoms of the child in the international and regional legal framework, as set out in Chapter 3, this chapter will analyse the models employed in different foreign jurisdictions that are used to achieve legal gender recognition. The aim of the analysis is to establish what is deemed to be the best practice in implementing the framework set out by international and regional law. The relevance of these perspectives lies in its potential to provide guidelines to the South African legal system as to how the commitment to international human rights laws can be strengthened.

4 2 The models for legal gender recognition

4 2 1 A medicalised approach

For the majority of jurisdictions worldwide, legislative frameworks either exclude or limit the rights of transgender individuals to have their gender legally recognised.⁸ Legislation that provides for legal gender recognition often calls for certain medical preconditions before applicants have access to legal gender recognition.⁹ These medical preconditions are subcategories of the treatment model, the assessment model, or a combination of the two.

The treatment model requires the applicant for legal gender recognition to: (i) have had stage two treatment such as hormone treatment; (ii) or have been sterilised; (iii)

⁶ See Principle 31 of Annexure A of this thesis.

⁷ Parliamentary Assembly of the Council of Europe "Discrimination against transgender people in Europe" (2015) *Parliamentary Assembly of the Council of Europe* [6.1] <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736>> (accessed 07-08-2018).

⁸ PR Dunne *The Conditions for Obtaining Legal Gender Recognition: A Human Rights Evaluation* DPhil thesis, Trinity College Dublin (2018) 262.

⁹ As noted in heading 4 1 of Chapter 2, these medical pre-conditions include: surgery, hormone treatment, sterilisation and third-party interventions. See also Dunne *The Conditions for Obtaining Legal Gender Recognition* 115.

or have had sex reassignment surgery (stage three).¹⁰ An example hereof can be found in the law of the Czech Republic,¹¹ which permits a person to alter their gender if they had genital surgery and has been sterilised. In Finland,¹² a person can legally change their gender if they have been sterilised and experience feelings of belonging to the opposite gender which differs from their assigned gender.¹³

A further example of the medicalised approach is presented in the South African Alteration Act. The Alteration Act does not require a sterilisation as with the abovementioned jurisdictions, but it however requires a medical transition, since section 2(1) of the Alteration Act provides as follows:

“Any person whose sexual characteristics have been altered by surgical or medical treatment ... may apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register”.¹⁴

In terms of the assessment model, third-party evidence of a medical practitioner should support an application for legal gender recognition and should be considered by a court or an administrative body.¹⁵ Countries using an administrative assessment

¹⁰ Tanner stages are explained under heading 2 4 1.

¹¹ “The law in the Czech Republic permits a person to change their legally recognised gender including a change in their personal identification number, provided they have had genital surgery and been sterilised.” See Scottish Government “Scotland Review of the Gender Recognition Act 2004: A Consultation” (2017) *Scottish Government* <https://consult.gov.scot/family-law/review-of-the-gender-recognition-act-2004/supporting_documents/SCT10172517581_Gender_p4%203.pdf> para 5 (accessed 09-07-2018).

¹² The Finnish Act on Legal Recognition of the Gender of Transsexuals No.563/2002 states that “A Finnish national, or person resident in Finland must:

“(i) submit a medical statement confirming that they have been sterilised or are otherwise infertile and that they feel they belong permanently to the opposite gender from their assigned gender; and (ii) evidence of the consent of their spouse or partner where they are married or in a recognised partnership”.

See Scottish Government “Scotland Review of the Gender Recognition Act 2004: A Consultation” *Scottish Government* para 5 2.

¹³ As at 2018, 14 European countries continued to impose a sterilization requirement on transgender individuals. See PR Dunne “Transgender Sterilization Requirements in Europe” (2017) 25 *Medical Law Review* 554 554. See also PR Dunne “Legal gender recognition in Europe: sterilization, diagnosis and medical examination requirements” (2017) 39 *Journal of Social Welfare and Family Law* 496 498. See also TGEU “Trans rights Europe map & index 2018” (14-05-2018) *tgeu.org* <<https://tgeu.org/trans-rights-map-2018/#forced-sterilisation>> (accessed 09-03-2019).

¹⁴ See heading 5 3 4 for a full discussion on the implications of the Alteration of Sex Description and Sex Status Act 49 of 2003 (“Alteration Act”) and heading 6 3 for the criticism against the Alteration Act.

¹⁵ Scottish Government “Scotland Review of the Gender Recognition Act 2004: A Consultation” *Scottish Government* para 3.

model include the Australian Capital Territory (“ACT”)¹⁶ and British Columbia.¹⁷ In the ACT, a person can apply to change their “sex” on their birth certificate if a medical practitioner supports the application. The statement of the medical practitioner should state whether the applicant had “appropriate clinical treatment” or that the applicant is intersex.¹⁸ Applicants can apply to be registered as male, female, indeterminate, unspecified or intersex.¹⁹ This provision is similar to section 2(2) of the South African Alteration Act, which requires the report of the examining medical practitioner to accompany the application with the former stating the “nature and results of any procedures carried out and any treatment applied”.²⁰

France²¹ and New Zealand²² use a court-based assessment model. In New Zealand, people aged 18 years and older may apply to the Family Court to have their

¹⁶ “A person seeking to change their sex on a birth certificate issued in the ACT can apply to Access Canberra enclosing an application form and a statement by a doctor. They can apply to be registered as Female, Male, Unspecified, Indeterminate or Intersex. The statement from the doctor or psychologist requires to confirm either that that applicant has had ‘appropriate clinical treatment’ for the alteration of their sex or that the applicant is an intersex person”. See Part 4 of the Births, Deaths and Marriage Act 28 of 1997. See also Scottish Government “Scotland Review of the Gender Recognition Act 2004: A Consultation” *Scottish Government* para 3.

¹⁷ “A person seeking to change their sex on a birth certificate issued in British Columbia may apply to change this from female to male or vice versa by applying to the British Columbia Vital Statistics Agency. The application form states that they “have assumed, identify with and intend to maintain the gender identity that corresponds with the requested change”. In addition, they must provide a statement in the prescribed form from a physician or psychologist confirming that the applicant’s gender identity does not align with the “sex” designation on the identification issued to the applicant by the provincial government. A person under 18 may also apply provided they have the consent of all their parents or legal guardians, and are able to provide a required statement from a physician or psychologist. A similar arrangement is also used in the Canadian province of Manitoba”. See section 27 of the Vital Statistics Act of 1996. See also Scottish Government “Scotland Review of the Gender Recognition Act 2004: A Consultation” *Scottish Government* para 3 17.

¹⁸ Scottish Government “Scotland Review of the Gender Recognition Act 2004: A Consultation” *Scottish Government* para 3.

¹⁹ ACT Government “Recording a change of sex on the birth register” (2018) *Access Canberra* <https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/1691> (accessed 06-02-2019).

²⁰ This indicates that South Africa uses a combination of the treatment and assessment model. A discussion on the South African position follows in Chapter 5 of this thesis.

²¹ “The legal gender recognition process adopted in France in 2017 is court-based. The applicant must provide supporting evidence such as evidence that they appear publicly to belong to the sex in which they want to be legally recognized ... The law in France was altered with effect from 1 January 2017. Any adult or *emancipated* child can apply to the court to have their gender corrected in the civil registry, declaring their free and informed consent to the change of documents with supporting evidence. They require to demonstrate sufficient facts in support of this such as: that they appear publicly to belong to the affirmed sex; that they are known in that sex to their family, friends and colleagues; or that they have changed their forename to one of the affirmed sex”. Scottish Government “Scotland Review of the Gender Recognition Act 2004: A Consultation” *Scottish Government* Annex D.

²² “Applications are made to the Family Court for a declaration that the birth certificate issued to them should contain their nominated sex and not the sex assigned to them in the birth register. Typically, there must be expert medical evidence that the applicant: [i] has assumed or has always had the gender identity of a person of the nominated sex; [ii] has undergone medical treatment usually regarded by medical experts as desirable to enable persons of the applicant’s genetic and physical conformation at

gender altered. This assessment model requires the applicant to have lived with their affirmed gender publicly, that their family members and friends are aware of their affirmed gender, or that they have changed their forename. The court-based assessment model typically cannot function without the involvement of the administrative assessment model. Generally, courts would rely on expert medical evidence in determining their decision.²³

The difference between the treatment model and the assessment model is that the treatment model requires a medical alteration before the applicant may apply to have their gender marker changed. The assessment model requires that a medical practitioner should assess the applicant before the application. In most countries, these two models are both required, as is the case in South Africa. If an applicant is transgender, they would first have to undergo the medical alteration or transition and then be assessed by a medical practitioner, who then compiles a report in support of the applicant's application for legal gender recognition.

In 2017, the European Court of Human Rights ("ECtHR") noted in *AP, Garçon and Nicot v France*²⁴ that making legal gender recognition conditional upon receiving a medical alteration or sterilisation treatment, procedures to which they do not want to submit, renders an individual's full right to privacy and bodily integrity conditional.²⁵ Furthermore, it is submitted that, in respect of children, these preconditions are at odds with best practices embodied by the UNCRC, the ACRWC, Yogyakarta Principles and Parliamentary Assembly of the Council of Europe (the "Assembly") Resolution 2048 on Discrimination against Transgender People in Europe ("Resolution 2048").²⁶ The analysis of the UNCRC in Chapter 3 of this thesis showed that the child's right to their

birth to acquire a conformation that accords with the gender identity of a person with the nominated sex; and [iii] will as a result maintain a gender identity of a person of the nominated sex". Section 28 of the New Zealand Births, Deaths, and Marriages and Relationships Act of 1995. See Scottish Government "Scotland Review of the Gender Recognition Act 2004: A Consultation" *Scottish Government* Annex D.

²³ Scottish Government "Scotland Review of the Gender Recognition Act 2004: A Consultation" *Scottish Government* Annex D.

²⁴ *AP, Garçon and Nicot v France* (2017) ECHR 338 (06 April 2017).

²⁵ Registrar of the Court "The requirement to undergo sterilisation or treatment involving a very high probability of sterility in order to change the entries on birth certificates was in breach of the right to respect private life" (2017) *European Court of Human Rights* <<https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-5677681-7200217&filename=Judgment%20A.P.%2C%20Garçon%20v.%20France%20-%20change%20of%20entries%20concerning%20sex%20on%20birth%20certificates.pdf>>.

²⁶ Scottish Government "Scotland Review of the Gender Recognition Act 2004: A Consultation" *Scottish Government* para 3 09. See also *AP, Garçon and Nicot v France* (2017) ECHR 338 (06 April 2017). See heading 4 3 for a discussion on Resolution 2048.

identity should be respected, protected and preserved. To *preserve* means to maintain the child's established gender identity in its existent state. Furthermore, the UNCRC also grants the child the right to self-determination.²⁷ This accords with the Yogyakarta Principles and Resolution 2048 that calls for the abolition of the requirement of utilising a medicalised approach in accessing legal gender recognition.²⁸

4 2 2 The self-declaration model

The Yogyakarta Principles state that an individual's self-defined gender identity is "integral to their personality" and is a basic aspect of the right to self-determination, equality, freedom, and dignity.²⁹ The WPATH states that "no person should have to undergo surgery or accept sterilization as a condition of identity recognition"; States should "eliminate unnecessary barriers"; and should "institute quick, transparent and accessible procedures for transgender people to obtain legal gender recognition" that aligns with their gender identity.³⁰

Furthermore, Resolution 2048 notes that:

"A number of Council of Europe Member States have recently reformed their legislation on legal gender recognition or are in the process of doing so. Some regulations are based on the principle of self-determination and do not require long and complex procedures or the involvement of medical practitioners or psychiatrists ... The Assembly welcomes, in this context, the emergence of a right to gender identity, first enshrined in the legislation of Malta, which gives every individual the right to recognition of their gender identity and the right to be treated and identified according to it".³¹

The self-declaration model connotes that the decision is entirely based on the applicant's own declaration.³² Article 8 of the UNCRC provides that the gender identity of the child should be respected without unlawful interference, which means that every child should have the right to establish their own unique identity.³³ With the self-

²⁷ See heading 3 4 3.

²⁸ See heading 3 5.

²⁹ See Annexure A of this thesis.

³⁰ The World Professional Association for Transgender Health Standards of Care for the Health of Transsexual, Transgender, and Gender Non-conforming People 7th version WPATH.

³¹ Parliamentary Assembly of the Council of Europe "Discrimination against transgender people in Europe" *Parliamentary Assembly of the Council of Europe* para 4–5. As quoted by C Gray *A critique of the legal recognition of transsexuals in UK law* PhD dissertation, University of Glasgow (2016) 208.

³² Scottish Government "Scotland Review of the Gender Recognition Act 2004: A Consultation" *Scottish Government* para 3 20. The case is *AP, Garçon and Nicot v France* 2017 ECHR 338 (06 April 2017).

³³ Article 8 states that:

declaration model, there is no role for the medical profession or a court in determining an individual's gender identity. Thus, legal requirements such as the "diagnosis of mental disorder[s], medical treatment and invasive surgery, mandatory psychiatric institutionalisation, assessment of time lived in new gender identity and being single or divorced" would no longer have to be met in order to determine whether an individual could be themselves since "[s]uch requirements violate a person's dignity, physical integrity...and [their right] to be free from degrading and inhuman treatment".³⁴

The self-declaration model best fits the framework established by the UNCRC, Yogyakarta Principles, Resolution 2048 and the Advisory Opinion on Gender Identity, Equality, and Non-Discrimination of Same-Sex Couples issued by the Inter-American Court of Human Rights. As of 2019, Norway,³⁵ Belgium,³⁶ Denmark,³⁷ Colombia,³⁸ Malta,³⁹ Argentina,⁴⁰ and the Republic of Ireland have all adopted this model.⁴¹

"States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference".

³⁴ Parliamentary Assembly of the Council of Europe "Discrimination against transgender people in Europe" *Parliamentary Assembly of the Council of Europe* para 4–5.

³⁵ Norway Legal Gender Amendment Act of 2016. Section 2 states that:

"In this provision the right to change legal gender is established. The condition is that the person feel they belong to the opposite gender than the gender he or she is registered with in the National Registry. Under the proposal, the amendment will be based on a self-declaration".

The full Act is available at: TGEU "Unofficial Translation of the Norway Legal Gender Amendment Act 2016" (2016) *TGEU* <<https://tgeu.org/wp-content/uploads/2016/07/Prop74LEng.pdf>> (accessed 09-08-2018).

³⁶ Available at: La Chambre "Projet de loi réformant des régimes relatifs aux personnes transgenres en ce qui concerne la mention d'une modification de l'enregistrement du sexe dans les actes de l'état civil et ses effets – Parliamentary Doc No. 54K2403" (2017) *De Kamer* <<http://www.dekamer.be/kvvcr/showpage.cfm?section=flwb&language=fr&cfm=flwbn.cfm?lang=N&dossierID=2403&legislat=54>> (accessed 07-07-2017). See also, ILGA-Europe "New legal gender recognition legislation approved by Belgium!" (2017) *ILGA-Europe Website* <<https://www.ilga-europe.org/resources/news/latest-news/new-legal-gender-recognition-belgium>> (accessed 20-04-2019).

³⁷ The full Lov om ændring af lov om Det Centrale Personregister Danish Act can be found at <https://www.ft.dk/Rlpdf/samling/20131/lovforslag/L182/20131_L182_som_fremsat.pdf>. See also Danish Ministry of Justice *Report of the Working group on legal gender recognition from 27th February 2014* (2014) 20. See further TGEU statement "Historic Danish Gender Recognition Law comes into Force" (2014) *TGEU* <<https://tgeu.org/tgeu-statement-historic-danish-gender-recognition-law-comes-into-force/>> (accessed 20-07-2018).

³⁸ The full Colombian act is available at: <https://www.asambleanacional.gob.ec/es/system/files/ro_ley_organica_de_gestion_de_la_identidad_y_datos_civiles_ro_684_2do_supl_04-02-2015.pdf>. See Duffy "Colombia's new gender recognition law doesn't require surgery" (2015) *Pink News* <<https://www.pinknews.co.uk/2015/06/12/colombias-new-gender-recognition-law-doesnt-require-surgery/>> (accessed 20-07-2018).

³⁹ See heading 4 4 1 for a discussion on the GIGESC Act.

⁴⁰ See heading 4 3 for a discussion on the Argentinian Ley de Identidad de Género.

⁴¹ Parliamentary Assembly of the Council of Europe "Discrimination against transgender people in Europe" *Parliamentary Assembly of the Council of Europe* paras 4–5. The first European state to reform

Therefore, in light of the theoretical approaches to reforming gender recognition laws, the following section will explain how the abovementioned models are employed in different foreign jurisdictions, while also outlining the importance of implementing a self-declaratory model.

4.3 The Argentinian Gender Identity Law

The need to lobby the government for transgender recognition in Argentina was borne from the deeply rooted marginalisation, stigmatisation, and discrimination of transgender individuals. In 2012, the Argentinian *Ley de Identidad de Género* (Gender Identity Law), sought to remedy these societal issues by utilising legal reform as a mechanism for social change.⁴² The Gender Identity Law was the first of its kind to legally enshrine a right to gender identity that the State was obliged to safeguard. The Law established a new regime for legal gender recognition in Argentina, which moved away from a court-based approach towards the self-determination model that takes the self-perception of transgender individuals into consideration.⁴³ The Argentinian Gender Identity Law affirms three substantial rights: (i) everyone has the right to have their name and gender identity recognised in a simple declaration procedure which safeguards the right to self-determination of every person; (ii) a right to free personal development and (iii) a right to dignified treatment.

Article 2 of the Gender Identity Law defines gender identity as:

“[T]he internal and individual way in which gender is perceived by persons, that can correspond or not to the gender assigned at birth, including the personal experience of the body. This can involve modifying bodily appearance or functions through pharmacological,

their Law on gender to the self-declaration model was Denmark by making amendments to the Danish Civil Registration System:

“The new Danish regulations represent a turning point and the first time that the principle of self-determination is enacted in Europe. [Denmark] make[s] it possible to obtain legal gender recognition by requesting a new social security number. No surgical intervention or treatments such as hormone replacement therapy are requested. The law introduces a reflection period (the request needs to be confirmed six months after the original application) and a minimum age of 18”.

See Parliamentary Assembly of the Council of Europe “Discrimination against transgender people in Europe” *Parliamentary Assembly of the Council of Europe* para 6.8. See further Gray *A critique of the legal recognition of transsexuals in UK law* 11.

⁴² TENI “A Comparative Analysis of Gender Recognition Laws: A Research Report Conducted by Trinity FLAC in Association with TENI” (2014) *TENI research report* available at: <<https://trinityflac.files.wordpress.com/2014/09/teni-research-project.pdf>> 14. See also Argentinian *Ley de Identidad de Género*. See TGUE “English Translation of Argentina’s Gender Identity Law as approved by the Senate of Argentina on May 8, 2012” (2012) *TGEU* <<https://tgeu.org/argentina-gender-identity-law/>> (accessed 09-09-2018).

⁴³ Giosa, Schiro & Dunne “The Legal Status of Transsexual and Transgender Persons in Argentina” in Scherpe *The Legal Status of Transsexual and Transgender Persons* (2015) 571–572.

surgical or other means, provided it is freely chosen. It also includes other expressions of gender such as dress, ways of speaking and gestures”.

Article 2 implements the self-declaration model in the definition of gender identity, by encompassing free choice and freedom of expression and dignity.⁴⁴ The approach adopted by the Gender Identity Law is progressive in relation to its emphasis on self-determination. The law recognises that all people are able to determine their own gender identity by recognising their right to dignity, equality, freedom of choice and personal development. There is no need for medical statements or to undergo medical treatment in order to access legal gender recognition procedures.⁴⁵ Gender information in official documents is furthermore to be altered in a quick, transparent and accessible way.⁴⁶

Furthermore, the Gender Identity Law enshrines a right to dignified treatment, which entails an obligation to respect the gender identity adopted by individuals, particular children using a first name that might be different from the name recorded on their national identity documents.⁴⁷ Under the Gender Identity Law, access to legal gender recognition is based on an administrative procedure.⁴⁸ The Law calls for easily accessible mechanisms for legal gender recognition by having no barriers in place to alter one’s gender identity, which extends the enjoyment of the Law to children. Although the Law sets out the requirements for legal gender recognition procedures to individuals who have reached the age of eighteen, it does provide for special procedures in relation to children. Article 5 states as follows:

In relation to those persons younger than eighteen (18) years old, the request for the procedure detailed in Article 4 must be made through their legal representatives and with

⁴⁴ TENI “A Comparative Analysis of Gender Recognition Laws: A Research Report Conducted by Trinity FLAC in Association with TENI” (2014) *TENI research report* 16.

⁴⁵ It should, however, be noted that the legislation does enshrine a guarantee to free healthcare to the end of promoting the development of one’s gender identity, which includes a right to free gender reassignment surgery. See Article 11 and TENI “A Comparative Analysis of Gender Recognition Laws: A Research Report Conducted by Trinity FLAC in Association with TENI” (2014) *TENI research report* 16.

⁴⁶ Articles 1 and 6 of the Ley de Identidad de Género 2012.

⁴⁷ Article 12 of the Gender Identity Law states that:

“The gender identity adopted by the individual must be respected, particularly in the case of girls, boys and adolescents using a first name that is different from the one recorded in their national identity documents. Whenever requested by the individual, the adopted first name must be used for summoning, recording, filing, calling and any other procedure or service in public and private spaces”.

⁴⁸ Giosa, Schiro & Dunne “The Legal Status of Transsexual and Transgender Persons in Argentina” in *The Legal Status of Transsexual and Transgender Persons* 576.

explicit agreement by the minor, taking into account the evolving capacities and best interests of the child as expressed in the Convention on the Right of the Child...”.

The need to ensure and consider the best interests and evolving capacities, as expressed in the UNCRC, are the principles at the core of the provisions set out for children. Furthermore, the Article requires assistance from a legal representative to act, with the explicit consent from the child, on their behalf, which may remove the need of parental involvement. If it is not possible to obtain assistance from any of the child’s legal representatives, the courts may be approached by means of summary proceeding, where a judge will decide on the alteration of the child’s gender identity, while considering the best interests and evolving capacities of the child. Article 5 does not have an age requirement in place to access legal gender recognition. Of significance to the right of the child to legal gender recognition, regardless of their age, is that in 2013, a 6-year-old girl was allowed to alter her documentation under the Argentinian Gender Identity Law.⁴⁹ In giving effect to the child’s right to access legal gender recognition, the National Secretariat of Childhood, Adolescence and Family, argued that the decision to refuse recognition of her gender identity violates the child’s right to equality, the right to preserve identity and the right to be heard.⁵⁰

Once the requirements set out in the Gender Identity Law have been met, a new birth certificate and identification document will be issued, which reflects the child’s gender identity. The Gender Identity Law therefore respects, protects and promotes the rights of transgender children in Argentina, by firstly recognising the research that illustrates that children are aware of their gender identity from a very young age, and secondly, acknowledges and implements the rights of children as enshrined by the UNCRC, while reflecting Argentina’s commitment to international human rights law.⁵¹

Both the Argentinian Gender Identity Law and the Inter-American Court of Human Rights’ Advisory Opinion on Gender Identity, Equality, and Non-Discrimination of Same-Sex Couples can arguably be classified as leading international authorities in

⁴⁹ See J Nichols “Argentina Grants Lulu, 6-Year-Old Transgender Child, Female ID Card” (2013) www.huffingtonpost.co.za <https://www.huffingtonpost.co.za/entry/argentina-child-transgender_n_4077466> (accessed 21-08-2018).

⁵⁰ Giosa, Schiro & Dunne “The Legal Status of Transsexual and Transgender Persons in Argentina” in *The Legal Status of Transsexual and Transgender Persons* 577.

⁵¹ TENI “A Comparative Analysis of Gender Recognition Laws: A Research Report Conducted by Trinity FLAC in Association with TENI” (2014) *TENI research report* 19. See also Giosa, Schiro & Dunne “The Legal Status of Transsexual and Transgender Persons in Argentina” in *The Legal Status of Transsexual and Transgender Persons* 584.

relation to legal gender recognition. The Court obliged Member States to guarantee the change of name and right to rectifications of public records to reflect the self-perceived gender identity that is based on the applicants free and informed consent. The Court emphasised that such procedure should be confidential, fast and cheap and should not require any evidence of hormone or surgical treatment. Furthermore, it was noted that the processes should be made available to adults as well as children.⁵²

4 4 Legal developments in Europe

The two documents of the Council of Europe that strengthened the positive obligation for legal gender recognition, are Resolution 2048 and the 2010 Committee of Ministers Recommendations on measures to combat discrimination on grounds of sexual orientation and gender identity (Committee of Ministers' recommendations). Resolution 2048 notes that:

"The Assembly is concerned about the violations of fundamental rights, notably the right to private life and to physical integrity, faced by transgender people when applying for legal gender recognition; relevant procedures often require sterilisation, divorce, a diagnosis of mental illness, surgical interventions and other medical treatments as preconditions. In addition, administrative burdens and additional requirements, such as a period of "life experience" in the gender of choice, make recognition procedures generally cumbersome. Furthermore, a large number of European countries have no provisions on gender recognition at all, making it impossible for transgender people to change the name and gender marker on personal identity documents and public registers".⁵³

The Assembly called on Member States to make these procedures available to all people who seek them, irrespective of their age or medical status.⁵⁴ Further, Member States should abolish compulsory medical treatment and mental health diagnosis as a necessary legal requirement to access legal gender recognition.⁵⁵ The Assembly also asked that gender markers be changed without any prerequisites such as reaching a certain age or undergoing certain treatments and/or procedures, which gives full effect to the child's right to self-determination, gender identity and their best

⁵² Advisory Opinion on Gender Identity, Equality, and Non-Discrimination of Same-Sex Couples, (2017), OC-24/17.

⁵³ Parliamentary Assembly of the Council of Europe "Discrimination against transgender people in Europe" *Parliamentary Assembly of the Council of Europe*.

⁵⁴ Para 6 2 1.

⁵⁵ Para 6 2 2.

interests.⁵⁶ The European Union described the recognition of gender identity for children as a “positive trend” and that children should be acknowledged as rights holders who should be listened to in any decision-making process that concerns them.⁵⁷

The Committee of Ministers called for quick, transparent, and accessible procedures for legal gender recognition in Europe. This should be based on the right to self-determination and the right to identity, and allow for changing the name and registered gender on birth certificates, ID cards, passports, educational certificates, and other similar documentation.⁵⁸ The formulation of “quick, transparent and accessible” procedures is also found in Principle 31 of the Yogyakarta Principles and is prescribed by the WPATH.⁵⁹ The DSM-5 and the ICD-11 requires a minimum period of two years of an incongruence before any diagnosis can be made on gender dysphoria. The time requirement can be crucial for the applicant. Extending the time period for accessing legal gender recognition can result in violations of the right to identity, privacy, equality, and dignity for transgender children, while also contradicting their best interests.⁶⁰ Further, transparency requires the provisions to provide a clear procedure on how to alter the name and recorded gender. This includes clarification on the implementation of the law and the bodies that are responsible. Lastly, accessibility requires that no barriers exist that might render the process inaccessible. This must be ensured to all transgender people who seek legal gender recognition, independent of their gender identity, medical status, age or other status.⁶¹

In relation to transgender children, these “quick, transparent and accessible” procedures should be granted in their best interests. The use of age restrictions may

⁵⁶ Para 6 2 2.

⁵⁷ Council of Europe, Commissioner for Human Rights of the Council of Europe (2014), “LGBT children have the right to safety and equality”, Human Rights Comment, Strasbourg. See also <<http://www.welfare.ie/en/pressoffice/Pages/pr080118.aspx>>. See further, Report to the Minister for Employment Affairs and Social Protection “Review of the Gender Recognition Act 2015” (19-07-2018) *Department of Employment Affairs and Social Protection* <<http://www.welfare.ie/en/downloads/GRA%20Review%20Report.pdf>> (accessed 19-07-2018) 12.

⁵⁸ Committee of Ministers of the Council of Europe Recommendations on Measures to Combat Discrimination on Grounds of Sexual Orientation and Gender Identity – CM/Rec 2010(5) para 21, <<http://tinyurl.com/cp32kfa>>. See Parliamentary Assembly of the Council of Europe “Discrimination against transgender people in Europe” *Parliamentary Assembly of the Council of Europe*. See also Köhler & Erth “Legal Gender Recognition in Europe” *TGUE* 9.

⁵⁹ See heading 4 2 2.

⁶⁰ See heading 5 3 4 2.

⁶¹ Parliamentary Assembly of the Council of Europe “Discrimination against transgender people in Europe” *Parliamentary Assembly of the Council of Europe* para 2 1. See also Köhler & Erth “Legal Gender Recognition in Europe” *TGEU* 14–15.

obstruct the best interests of the child which, in turn, may also contradict non-discrimination provisions in the UNCRC, ACRWC and the Yogyakarta Principles.⁶² The right to dignity, autonomy, privacy, development, and the right to participate and to be heard must be provided to minors in all administrative and judicial procedures while taking their evolving capacities into account.⁶³ Age should not be regarded as a way to automatically deny children gender recognition on the ground that they are too young. Accessibility of gender recognition in Europe, independent of age, is becoming more pressing as more young children “come out” at an earlier age. In this regard, the WPATH confirms that “increasing numbers of adolescents have already started living according to their gender identity upon entering high school”.⁶⁴

An increasing number of European states have gender recognition processes in place for children.⁶⁵ In the Netherlands and Ireland, gender recognition is accessible from the age of 16. Ireland follows a *quasi*-self-declaration model which supports the absolute right to gender recognition if the applicant is over the age of 18. If the child is over the age of 16, the parents must consent to the application along with expert evidence from a medical practitioner.⁶⁶

In Norway, a 6-year-old can access legal gender recognition: from the age of 6 to 16, the parents can apply on behalf of the child, and from the age of 16 the child can apply for gender recognition in their own capacity. If two people have custody over a child, both must submit an application on behalf of the child. Where one parent does not agree, the Country Governor will assess what is in the child’s best interests. The factors that will be considered are (i) the child’s age and maturity; (ii) what gender expression the child has practised; (iii) in what way and for how long and how consistently the child has expressed their gender identity; (iv) the reasons why one parent does not consent to amending the legal gender; (v) the relationships between the child and the two parents and which of these must be presumed to know the child

⁶² Articles 3, 8, 12, 24 and 6 of the UNCRC. See heading 3 4 2 for a discussion on the best interests of the child principle under the international law. See also Henzel (2016) *Humboldt Law Clinic* 12. See also, Annexure A of this thesis. Principle 24 C: “the best interests of the child shall be a primary consideration” and the “gender identity of the child ... may not be considered incompatible with such best interests.”

⁶³ Köhler & Erth “Legal Gender Recognition in Europe” *TGEU* 29.

⁶⁴ The World Professional Association for Transgender Health Standards of Care for the Health of Transsexual, Transgender, and Gender Non-conforming People 7th version WPATH 12.

⁶⁵ See heading 4 2 2.

⁶⁶ Section 12(4)(a) and (b) of the Irish Gender Recognition Act of 2015 available at: <https://tgeu.org/wp-content/uploads/2015/08/IRELAND_Gender-Recognition-Act-2015.pdf>.

best.⁶⁷ The Norwegian Legal Gender Amendment Act provides children under the age of 6 with gender recognition if they have a “congenital somatic sex development uncertainty” (an intersex condition). In such cases, parents can apply on behalf of the child, along with a documented report by a medical practitioner. The parents and the medical practitioner must ensure that the child can express their views by considering the child’s self-declaration. There is a positive duty on the parents, since the Country Governor normally assumes that the statements from the parents ensure child participation.⁶⁸

4 4 1 The Maltese Gender Identity, Gender Expression and Sex Characteristics Act

In 2014, Malta became the first European country to enshrine protection from discrimination on the ground of gender identity in its Constitution.⁶⁹ The amendment of the Maltese Constitution forms the cornerstone of the GIGESC Act and resulted in changing the Maltese legal position. Prior to this amendment, Maltese legislation, like most other countries, required individuals to undergo sterilisation and surgical procedures before accessing any form of legal gender recognition. However, no State facility provided for such requirements, despite the ECtHR rulings in judgments such

⁶⁷ Section 4 of the Norway Legal Gender Amendment Act of 2016. The unofficial translation of the Norwegian Legal Gender Amendment Act is available at:

<<https://tgeu.org/wp-content/uploads/2016/07/Prop74LEng.pdf>>.

⁶⁸ Section 4. See also section 5, which states as follows:

“The provision states that applications for a legal gender amendment will first be processed by the Tax Office (National Registry Authority). A person wanting to amend their legal gender will submit a self-declaration that they regard themselves as belonging to the other gender than the one under which they are registered with the National Registry; see also the note on § 2. A decision to accept or deny an application for a legal gender amendment is an individual decision as defined by the Public Administration Act § 2. The decision is the determinant for a person’s right to amend their legal gender. The decision may therefore be appealed in accordance with the Public Administration Act chapter 6. Appeals in such cases should be made to the County Governor of Oslo and Akershus. Applications for amending legal gender submitted by a child with the support of only one of the two with custody, cf. § 4, second paragraph second sentence, will be processed by the County Governor of Oslo and Akershus. Appeals in such cases are processed by the National Appeals Body for the Health Services.”

⁶⁹ Article 32 of the Maltese Constitution provides that:

“Whereas every person in Malta is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –

- (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
- (b) freedom of conscience, of expression and of peaceful assembly and association; and
- (c) respect for his private and family life ...”

See Constitution of Malta, Chapter IV, Fundamental Rights and Freedoms of the Individual, Article 32, April 2014 available at:

<<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8566>>.

as *L v Lithuania*⁷⁰ and *Van Kück v Germany*,⁷¹ which provided that States have a positive obligation to provide means of access where the requirements were prerequisites for legal gender recognition. Nevertheless, the situation changed radically in 2015 when the GIGESC Act was passed.⁷²

The Maltese GIGESC Act was inspired by the Argentinian *Ley de Identidad de Género* (Gender Identity Law). Both acts set a context of rights and self-determination for gender identity that accord to international human rights standards.⁷³

Like Argentina, Malta provides for a right to “recognition of their gender identity”.⁷⁴ The GIGESC Act defines gender identity as:

“[E]ach person’s internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance and/or functions by medical, surgical or other means) and other expressions of gender, including name, dress, speech and mannerisms”.⁷⁵

It is important to point out that the GIGESC Act uses the exact definition of gender identity as found in the Yogyakarta Principles.⁷⁶ Article 3 of the Act sets out the procedure for legal gender recognition as follows:

- “3. (1) All persons being citizens of Malta have the right to
- (a) the recognition of their gender identity;
 - (b) the free development of their person according to their gender identity;
 - (c) be treated according to their gender identity and, particularly, to be identified in that way in the documents providing their identity therein; and
 - (d) bodily integrity and physical autonomy”.

⁷⁰ *L v Lithuania* 2008 46 ECHR 22.

⁷¹ *Kück v Germany* 2003 37 ECHR 51.

⁷² Gray *A critique of the legal recognition of transsexuals in UK law* 211.

⁷³ The Gender Identity Law did not create the right to identity in Argentina; it derives from the Argentinian Constitution in Article 17, which provides for the respect of identity of Indigenous peoples and Article 19 which protects cultural identity. Köhler & Erth “Legal Gender Recognition in Europe” *TGUE* 66–69.

⁷⁴ Article 3, 1 (a) of the GIGESC Act. The full text of the Act is available at:

<<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1>>.

⁷⁵ Article 2 of the GIGESC Act. The full text of the Act is available at:

<<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1>>.

⁷⁶ Introduction to the Yogyakarta Principles. See also heading 2 2 2. See further Annexure A of this thesis.

Importantly, the GIGESC Act only provides protection to Maltese citizens and is not accessible to all residents.⁷⁷ The GIGESC Act is based on self-declaration and an application for gender recognition must be filled through the notary. Upon notification, the Director of Public Registry must carry out the changes in the registry within 15 days.⁷⁸ The GIGESC Act allows children to obtain legal gender recognition, but the requirements are different than for adults.⁷⁹ For example, if the applicant is below the age of 18, a parent or guardian acting on the child's behalf must assist them. Section 7(2)(b) of the GIGESC Act states that in deciding whether to recognise the child's preferred gender, the best interests and the views of the child should always be considered. It is important to note that section 7(4) allows parents to postpone the inclusion of the child's gender marker until the child's gender has been determined.⁸⁰ Article 7 provides that parents can file an application to the Civil Court on behalf of the child and prescribes no age restriction, which stems from the use of the words "[a]ll persons" in Article 3(1).⁸¹ The court shall then ensure that the best interests of the child are the primary consideration and give due weight to the views of the child while taking the child's age and maturity into account. Once the court has approved the

⁷⁷ Köhler & Erth "Legal Gender Recognition in Europe" *TGEU* 70.

⁷⁸ Article 4 of the GIGESC Act. The full text of the Act is available at: <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1>.

⁷⁹ Gray *A critique of the legal recognition of transsexuals in UK law* 211.

⁸⁰ See section 7 of the Maltese GIGESC Act. The full text of the Act is available at: <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1>. See also Gray *A critique of the legal recognition of transsexuals in UK law* 211–212.

⁸¹ Article 7 states that:

"(1) The persons exercising parental authority over the minor or the tutor of the minor may file an application in the registry of the Civil Court (Voluntary Jurisdiction Section) requesting the Court to change the recorded gender and first name of the minor in order to reflect the minor's gender identity. (2) When an application under sub-article (1) is made on behalf of a minor, the Court shall: (a) ensure that the best interests of the child as expressed in the Convention on the Rights of the Child be the paramount consideration; and (b) give due weight to the views of the minor having regard to the minor's age and maturity. (3) If the Court accedes to the request made in accordance with sub-article (1), the Court shall order the Director to change the recorded gender and first name of the minor in the act of birth of the minor. (4) The persons exercising parental authority over the minor or the tutor of the minor whose gender has not been declared at birth, shall before the minor attains the age of eighteen, file an application in the registry of the Civil Court (Voluntary Jurisdiction Section) in order to declare the gender and the first name of the minor, if the minor wants to change the first name, and following the express consent of the minor, considering the evolving capacities and the best interests of the minor. The Civil Court (Voluntary Jurisdiction Section) shall order the Director to record the gender and first name of the minor in the act of birth of the minor".

The full text of the Act is available at:

<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1>.

application, the Director shall alter the gender information of the child on the official documentation.⁸²

4 4 2 Review Report of the Irish Gender Recognition Act

In 2015, Ireland introduced gender recognition legislation based on the self-declaration model to address their previous incompatibilities with their obligations under the ECHR.⁸³ The Irish Gender Recognition Act provided that in order to obtain a gender recognition certificate, the applicant had to be unmarried.⁸⁴ This requirement was as a result of pending legal challenges to the Marriage Equality Referendum at the time, which did not provide for same-sex marriages. The Marriage Act of 2015 was, however, amended and the requirement of not being married was subsequently removed from the Gender Recognition Act.⁸⁵ The purpose of the Gender Recognition Act is to allow the State “to recognise the change of gender”.⁸⁶ Sections 8 and 9 of the Act states that a Gender Recognition Certificate can be issued if an applicant “is at least 18 years of age on the date of application (those aged 16 or 17 can apply to the court for an exemption to this provision under section 12 of the Act)”.⁸⁷

Section 12 of the Act states that an applicant aged 16 and not yet 18, may direct their application to the Circuit Family Court with:

- “1. the consent of the child’s parents, surviving parent or guardian. There is provision for the dispersal of parental consent where (i) it cannot be obtained because the person cannot be identified or found or is failing or neglecting to respond to a request for consent or (ii) it should not be obtained because it would not be in the interest of the safety or welfare of the child to contact the person [section 12(5)];

⁸² Article 7. In the twelve months after the introduction of the Maltese GIGESC Act, forty-four persons changed their documents, in contrast to twenty-one gender recognition court cases in prior years where no gender recognition legislation existed. As is the case in Argentina, no cases of fraudulent use in terms of the GIGESC Act, are known. Köhler and Erth “Legal Gender Recognition in Europe” 72.

⁸³ *Foy v An t-Ard Chlaraitheoir* 2002 IEHC 116. See Report to the Minister for Employment Affairs and Social Protection “Review of the Gender Recognition Act 2015” *Department of Employment Affairs and Social Protection* 18.

⁸⁴ The full text of the Act is available at:

<<http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/html>>.

⁸⁵ The full text of the Marriage Act of 2015 is available at: <http://www.irishstatutebook.ie/eli/2015/act/35/enacted/en/print>. See Report to the Minister for Employment Affairs and Social Protection “Review of the Gender Recognition Act 2015” *Department of Employment Affairs and Social Protection* 31.

⁸⁶ Long Title, Gender Recognition Act 2015.

⁸⁷ Report to the Minister for Employment Affairs and Social Protection “Review of the Gender Recognition Act 2015” *Department of Employment Affairs and Social Protection* 33.

2. a certificate from the child's primary treating medical practitioner This is defined as "a person's primary treating endocrinologist or psychiatrist in relation to the matter the subject of an application for a gender recognition certificate" [section 12(4)(b)(i)]; and
3. a certificate from an endocrinologist or psychiatrist who has no connection with the child [section 12(4)(b)(ii)].⁸⁸

Further, section 7 of the Act obligates the Minister to commence a review of the Act within two years after it comes into operation.⁸⁹ The Review Group was announced in November 2017, and their report was published on 19 July 2018.⁹⁰ The Review Group considered the current position under the Act for children aged 16 and 17 as well as children younger than 16.⁹¹ Several outcomes were discussed and analysed. The Group made it clear that maintaining the *status quo* for children under 16-years-old was not an option. The Group considered applying the self-declaration model available to 18-year-olds and above to 16 and 17-year-olds, but had concerns about not including an element of parental consent and of setting an arbitrary age limit instead of recognising the evolving capacities of children.⁹² In addition, the option of extending the position available to 16 and 17-year-olds to under 16-year-olds was rejected due to its complicated and costly nature. The Group then considered an "interim" certificate that could be used to change the gender marker on passports and school documents, but this option raised concerns about the social transition process and because this would not involve changing the gender marker on the birth certificate. The Group noted that such *quasi*-recognition would not validate the rights of children. The final option that the Group considered was an administrative process for everyone under the age of 18 with a statutory declaration of parental consent with or without a certificate from a third party that reflects the voice, capacity and best interests of the child and no court proceedings unless one or both parents refuse to consent.⁹³ It is submitted that the

⁸⁸ The full text of the Act is available at: <<http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/html>>. See Report to the Minister for Employment Affairs and Social Protection "Review of the Gender Recognition Act 2015" (19-07-2018) *Department of Employment Affairs and Social Protection* <<http://www.welfare.ie/en/downloads/GRA%20Review%20Report.pdf>> (accessed 19-07-2018) 34.

⁸⁹ The full text of the Act is available at: <<http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/html>>. See Report to the Minister for Employment Affairs and Social Protection "Review of the Gender Recognition Act 2015" *Department of Employment Affairs and Social Protection* 2.

⁹⁰ Report to the Minister for Employment Affairs and Social Protection "Review of the Gender Recognition Act 2015" *Department of Employment Affairs and Social Protection* 2.

⁹¹ 2.

⁹² 84.

⁹³ 84–85.

final option accords to the best practices set out in the international legal framework, while also being quick, transparent and accessible.

4 5 Conclusion

Chapter 4 illustrated that there are various foreign jurisdictions that make provision for legal gender recognition for transgender individuals. However, most of these jurisdictions only ensure access for adults. In South Africa, children's access to legal gender recognition is limited by the implementation of restrictive and status-based legislation such as the need to undergo treatment or surgery.⁹⁴ The recognition of gender identity within the legislative framework is crucial for transgender children. Chapter 3 determined that there is indeed a duty on Member States in terms of international and regional law to respect, protect and promote the child's right to gender identity, since it will always be in the best interests of the child to have their core identity protected and recognised.

If the rights to human dignity, equality and freedom are to be upheld, the human rights regime needs to prioritise the elimination of stigmatisation, discrimination and abuse from within the legal framework and society that impede the rights to recognition and self-declaration.⁹⁵ One way of achieving this is to acknowledge the needs of transgender children in the legislative framework and to ensure effective access to appropriate gender recognition services based on self-determination.⁹⁶ Respecting the child's autonomous decision-making capabilities and participatory rights, require Member States, parents, and society to recognise the needs of the child. As observed in Chapter 2, research suggests that transgender children who receive support from their family and community are less vulnerable to mental anguish as a result of factors such as discrimination, harassment and rejection.⁹⁷

The approaches adopted by Argentina and Malta provides useful guidance on how to implement international standards on legal gender recognition for children regardless of their age. Questions, however, remain as to whether utilising the court application model would be effective in the South African context, and further, if it truly gives effect to the aspiring "quick, transparent and accessible" model called for by the

⁹⁴ The Alteration Act. See heading 5 3 4 for a discussion on the Alteration Act.

⁹⁵ Ghoshal & Knight (2016) *Human Rights Watch* 5.

⁹⁶ Bucataru (2016) 3 *QMHR* 73.

⁹⁷ Olson et al (2016) *Pediatrics*. See also Bucataru (2016) 3 *QMHR* 73.

Yogyakarta Principles, WPATH, the Inter-American Court and the Council of Europe. In this regard, the Argentinian Gender Identity Law, moves away from a court-based approach by adopting an administrative procedure to access legal gender recognition, which requires the child to be assisted by a legal representative. An interesting recommendation to consider, however, emanates from the Irish Review Group's report which proposes an administrative process for children under the age of 16 with a statutory declaration of parental consent. The practicality of implementing such a model in South Africa will be explored in Chapter 6 with the purpose of determining best practices for implementing South Africa's international duty to respect, protect and promote the rights of transgender children to legal gender recognition. Subsequent to the international and regional duty established in Chapter 3, the following chapter aims to establish the current legal status of transgender children in South Africa in order to ascertain if there is a duty in terms of the South African legislative framework to provide transgender children access to legal gender recognition.

CHAPTER 5: THE LEGAL STATUS OF TRANSGENDER CHILDREN IN SOUTH AFRICA

5 1 Introduction

The previous chapters illustrated that the rights of transgender children are protected under international law, soft law, and regional law mechanisms. The focus of this thesis will now turn to the South African legal framework. The Constitution guarantees everyone fundamental rights such as the right to human dignity, equality, and freedom. Yet, South Africa remains the most unequal country in the world, with inequality exacerbating unfair discrimination.¹ When inequality turns into unfair discrimination, vulnerable groups such as transgender children who do not conform to traditional values and norms, are exposed to various forms of discrimination, marginalisation, victimisation, abuse, degradation and maltreatment due to the fact that they are “different”.²

This Chapter will discuss the potential application of the Constitution to the promotion and protection of transgender children’s rights. In this regard, the rights to equality, human dignity, freedom, and other appurtenant rights of children will be analysed, along with case law for further clarification on how these rights apply to transgender children. Hereafter, the South African legislative framework will be examined to determine the scope of protection offered to the rights of transgender children. Furthermore, the case of *Nare Phillemon Mphela, The South African Human Rights Commission v Kgabo Francis Manamela and Limpopo Provincial Department*

¹ The South African Human Rights Commission “Research Brief on Gender and Equality in South Africa 2013 – 2017” (2017) *SAHRC* <<https://www.sahrc.org.za/home/21/files/RESEARCH%20BRIEF%20ON%20GENDER%20AND%20EQUALITY%20IN%20SOUTH%20AFRICA%202013%20to%202017.pdf>> 6. See also L Daniel “Is South Africa really the most unequal country in the world?” (2018) *The South African* <<https://www.thesouthafrican.com/is-south-africa-really-the-most-unequal-country-in-the-world/>> (accessed 12-02-2019). See further, World Facts “The World’s Most Unequal Countries” (2018) *World Atlas* <<https://www.worldatlas.com/articles/the-world-s-most-unequal-countries.html>> (accessed 12-02-2019). See also X Greenwood “South Africa is the most unequal country in the world and its poverty is the “enduring legacy of apartheid”, says World Bank” (2018) *The Independent* <<https://www.independent.co.uk/news/world/africa/south-africa-unequal-country-poverty-legacy-apartheid-world-bank-a8288986.html>> (accessed 12-02-2019).

² The South African Human Rights Commission “Research Brief on Gender and Equality in South Africa 2013 – 2017” *SAHRC* 6.

of *Education*³ will be discussed in order to highlight the court's response to the lived reality of transgender children in South Africa.

5 2 The Constitution of South Africa

5 2 1 Introduction

Section 1 of the Constitution guarantees a sovereign and democratic State which is founded on the values of human dignity, the achievement of equality and freedom, the supremacy of the Constitution and the rule of law. This means that any law or conduct that does not conform to the Constitution, is invalid, and all laws and conduct must accord to the Constitution.⁴

The Constitution includes a Bill of Rights that enshrines fundamental freedoms, rights, and civil liberties. The Bill of Rights forms a significant part of the Constitution and is integral to the Constitution's aim to transform the South African society, as well as the political and legal systems of the country.⁵ Section 7 reiterates that democracy is the cornerstone of South Africa's progress while affirming the fundamental values of human dignity, equality and freedom as set out in section 1. Further, the section places a duty on the State to "respect, protect, promote and fulfil the rights in the Bill of Rights" of every South African citizen.⁶

The Bill of Rights has been described as a trailblazer in respect of its protection and promotion of children's rights.⁷ Section 28 of the Constitution sets out rights that are only applicable to children. However, due to the fact that the Constitution grants "everyone" fundamental rights, children also enjoy the other rights enshrined in the Constitution, except those rights that directly exclude children, such as the right to

³ Nare Phillemon Mphela, *The South African Human Rights Commission v Kgabo Francis Manamela and Limpopo Provincial Department of Education* (2017) <<http://www.fedsas.org.za/files/Documents/Regsdokumente/F%20Hofuitsprake/South%20African%20Human%20Rights%20Commission%20v%20Kgabo%20Francis%20Manamela%20C%20Provincial%20Head%20of%20Department%20and%20others.DOCX>> (accessed 09-08-2018).

⁴ A Skelton "Constitutional Protection of Children's Rights" in T Boezaart (ed) *Child Law in South Africa* (2009) 327 358.

⁵ Currie & De Waal *The Bill of Rights Handbook* 1.

⁶ Section 7 of the Constitution states that:

"(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights ..."

⁷ P Alston & J Tobin *Laying the foundation for Children's Rights* (2005) UNICEF 7. See also Skelton "Constitutional Protection of Children's Rights" in *Child law in South Africa* 327.

vote.⁸ In *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*,⁹ Khampepe J held that:

“[T]he correct approach is to start from the premise that children enjoy each of the fundamental rights in the Constitution that are granted to “everyone” as individual bearers of human rights. This approach is consistent with the constitutional text, and gives effect to the express distinction that the Bill of Rights makes between granting rights to “everyone” on the one hand, and to adults only on the other hand”.¹⁰

The following section will examine the constitutional rights that guarantee fundamental freedoms, rights, and civil liberties to transgender children in South Africa.

5 2 2 The Bill of Rights

5 2 2 1 *The right to equality*

The achievement of equality is a constitutional imperative of the first order.¹¹ However, despite this, equality is a deeply controversial and contested social, philosophical, and political concept or ideal.¹² Currie and De Waal note that it is not the basic and abstract idea of equality that makes the right so difficult and controversial but rather the two issues ancillary to the idea of similar treatment for similar people. The first issue is that of determining what counts as relevant in establishing the similarity of people’s situations, and secondly, what constitutes similar treatment of people in similar situations.¹³

Formal equality means treating all individuals, regardless of external or internal difference, the same.¹⁴ It requires that everyone should be treated equally as equal rights-bearers and it does not take social and economic disparities between groups and individuals into account. Conversely, substantive equality aims to achieve equality of outcomes and allows treating individuals or groups more or less favourably to

⁸ Skelton “Constitutional Protection of Children’s Rights” in *Child law in South Africa* 327.

⁹ *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC).

¹⁰ Para 38. See also R Kruger & C McConnachie “The Impact of the Constitution on Learners’ Rights” in T Boezaart (ed) *Child law in South Africa* 2 ed (2017) 534 537.

¹¹ C Albertyn & B Goldblatt “Equality” in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 1 2013) 35–1.

¹² S Liebenberg “Equality rights and children: Moving beyond a one-size fits all approach” in K Hall (ed) *South African Child Gauge* (2012) 24 24. See also Currie & De Waal *The Bill of Rights Handbook* 210.

¹³ Currie & De Waal *The Bill of Rights Handbook* 211.

¹⁴ 211.

achieve this goal.¹⁵ Substantive equality requires an examination of social and economic disparities in order to establish if the Constitution's commitment to equality is being upheld.¹⁶ Therefore, substantive equality entails a contextual approach, and that context must encompass the influences of the private sphere on disadvantage and subordination.¹⁷

Section 9 is both a founding value of the Constitution and the first substantive right in the Bill of Rights.¹⁸ As a founding value, equality underpins how courts, tribunals, and forums interpret the Bill of Rights. The provision poses an imperative implementation of the idea of equality and also enacts a vertical and horizontal application of the right to equality.¹⁹ As a substantive right, section 9(1) requires everyone to be equal before the law, and be afforded equal protection and benefit of the law.²⁰ Section 9(2) provides for the "full and equal enjoyment of rights and freedoms". Therefore, the right to equality requires inclusivity. Social exclusion based on a person's belonging to a particular group is an example of how "others" are denied their "full and equal enjoyment of rights and freedoms". Social exclusion ultimately leads to disadvantage.

The Constitution requires that disadvantaged groups be assisted.²¹ Section 9(3) prohibits unfair discrimination on certain grounds. Unfair discrimination is "differentiation that has an unfair impact on its victims".²² The Constitutional Court stated in *Harksen v Lane NO* that the prohibited grounds of unfair discrimination have

¹⁵ 211–213.

¹⁶ 213.

¹⁷ Albertyn & Goldblatt "Equality" in *CLOSA* ch 35, 19.

¹⁸ Section 9 of the Constitution states that:

"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair".

¹⁹ A de Wet & W van Vollenhoven "Inclusivity: Applications of dignity, equality and freedom" (2015) 7 *International Journal of Education Law and Policy* 7.

²⁰ Liebenberg "Equality rights and children" in *South African Child Gauge* 24. See Currie & De Waal *The Bill of Rights Handbook* 210–211.

²¹ Albertyn & Goldblatt "Equality" in *CLOSA* 35–43.

²² Currie & De Waal *The Bill of Rights Handbook* 226. The Constitution does not define unfair discrimination. A definition is found in the PEPUDA. See discussion of the PEPUDA at heading 5 3 2.

been used in the past to “categorise, marginalise and often oppress” individuals, while also having the potential to attack the inherent right of human dignity.²³ The listed grounds that specifically relate to transgender children are gender, sex, and age.²⁴ Although this is not correct in terms of terminology, sex is used as a listed ground due to the current conflation between sex and gender within the South African legislative framework. In an alternative report to the United Nations Human Rights Committee (“UNHRC”), the Legal Resource Centre, Gender Dynamix and Iranti highlighted the inadequacy of the South African government’s use of terminology in state reports, frameworks, and policies.²⁵

The terms gender, sex and age, have already been discussed and differentiated in Chapter 2 of this thesis. To reiterate, *sex* is a biological term, and *gender* is a social term. In many instances, the two terms are confounded or used interchangeably.²⁶ As a result, it is necessary to consider both sex and gender as prohibited grounds of discrimination. The terms are often also used in the binary by only referring to inequalities between women and men. In this regard, the Commission on Gender Equality published a framework for transforming gender relations in South Africa wherein they define *gender* as the characteristics society expects someone to have, based on their sex.²⁷ Another framework, published by The Office on the Status of Women, defines *gender* as the social roles allocated to women and men in particular societies. The frameworks both define *gender* within the context of gender roles without mentioning gender variant identities. The frameworks define it as a social construct, but only in relation to what society expects of women, for example.²⁸

²³ *Harksen v Lane NO* 1998 1 SA 300 (CC) para 49.

²⁴ The listed grounds under section 9 (3) are: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth. The grounds identified in the main texts are just some of the grounds that pertain to transgender children’s rights.

²⁵ Legal Resource Centre & Gender Dynamix “Briefing Paper: Alteration of Sex Description and Sex Status Act, No.49 of 2003” (2015) *Gender Dynamix* <<https://www.genderdynamix.org.za/resources>> (accessed 29-05-2019). See also M Rubin “Right To Identity: The Implementation Of The Alteration Of Sex Description Act” (2015) *Legal Resource Centre* <<http://resources.lrc.org.za/right-to-identity-the-implementation-of-the-alteration-of-sex-description-act/>> (accessed 02-04-2019).

²⁶ An example hereof can be found in the discussion of the Alteration Act under heading 3 4 of Chapter 5. See also Albertyn & Goldblatt “Equality” in *CLOSA* 35-55.

²⁷ Commission on Gender Equality “A framework for transforming gender relations in South Africa” (2000) *Government of the Republic of South Africa* <https://www.gov.za/sites/default/files/transformation_0.pdf> (accessed 01-03-2019).

²⁸ The Office on the Status of Women “South Africa’s National Policy Framework for Women’s Empowerment and Gender Equality” (2001) *Environment* <https://www.environment.gov.za/sites/default/files/docs/national_policy_framework.pdf> xvii (accessed 09-03-2019).

Transgender children often are exposed to the worst of inequality, discrimination, exclusion, violence, marginalisation, and stigmatisation. However, everyone, including all children, regardless of their gender and gender identity, are entitled to the equality rights guaranteed in section 9 of the Constitution.²⁹ At the same time, equality also means that greater understanding of equal dignity for everyone invites equal respect for all.³⁰ The Constitutional Court has confirmed the link between equality and dignity on numerous occasions and stated that unfair discrimination means “treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity”.³¹

5 2 2 2 *The right to human dignity*

The right to human dignity includes that everyone is equal in dignity and rights by virtue of being human.³² The right to human dignity can be found in almost every human rights document and is widely recognised as an inherent and inalienable attribute of humans. As such, it is a right that underpins many other rights.³³

Section 1 of the Constitution emphasises that human dignity is one of the founding values of South Africa, but there is little certainty about the meaning of the concept. The Constitutional Court has not provided a comprehensive definition of the concept yet, but confirmed that human dignity has a “wide meaning which covers a number of different values”.³⁴ In *S v Makwanyane*, the Constitutional Court defined human dignity as an idea that all human beings are equal in dignity and are therefore worthy of equal respect and concern.³⁵

De Wet and Van Vollenhoven argue that an understanding of human dignity could guide “us” (society) towards an acceptance of so-called “others” as human beings

²⁹ Liebenberg “Equality rights and children: Moving beyond a one-size fits all approach” in *South African Child Gauge* 24.

³⁰ Currie & De Waal *The Bill of Rights Handbook* 210–211. See also M Smit *Fundamentals of Human Rights and Democracy in Education* (2013) 155. See also De Wet & Van Vollenhoven (2015) *International Journal of Education Law and Policy* 7.

³¹ *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) para 31 and *The President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41. See also De Wet & Van Vollenhoven (2015) *International Journal of Education Law and Policy* 7. See further Currie & De Waal *The Bill of Rights Handbook* 210–212.

³² Currie & De Waal *The Bill of Rights Handbook* 249–250. See also De Wet & Van Vollenhoven (2015) *International Journal of Education Law and Policy* 6.

³³ Currie & De Waal *The Bill of Rights Handbook* 250.

³⁴ Woolman “Dignity” in *CLOSA* 36–2. See also Currie & De Waal *The Bill of Rights Handbook* 251.

³⁵ *S v Makwanyane* 1995 3 SA 391 (CC) para 10.

entitled to respect and concern for their dignity.³⁶ Section 10 of the Constitution states that human dignity is inherent to every individual and places a duty on the State and any other person to respect and protect the dignity of every other individual. Therefore, it implies that any “othering” which occurs in society should be eliminated to protect people from exclusion, oppression, inequality, discrimination, violence, marginalisation and stigmatisation, which would violate their right to dignity.³⁷ Human dignity should thus be used as a guiding mechanism to foster respect for, and ensure the inclusion of others.³⁸ De Wet and Van Vollenhoven argue further that this should not be a purely re-active or punitive approach, but should rather be aimed at changing attitudes to enhance inclusion pro-actively. Inclusivity implies equality in the sense that everyone is seen as equally different and equally human, which in turn alludes to the acceptance of human dignity for all.³⁹ In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the idea of equal respect was the basis for the Constitutional Court’s decision in finding that the common-law criminalisation of sodomy violated the right to human dignity.⁴⁰ The respect for an individual’s human dignity consists of the recognition that every person is able to make individual choices.⁴¹ If this is accepted, it should naturally follow that a transgender child’s decision to have their inherent identity recognised should be respected and implemented, since this would be in accordance with the constitutional right to human dignity.

³⁶ De Wet & Van Vollenhoven (2015) *International Journal of Education Law and Policy* 6–7.

³⁷ “The increasing importance of inclusivity has been highlighted by authors such as Voyer, Puett, Brumbaugh and Grier who noted that modern-day societies are increasingly becoming more diverse in terms of ethnicity, religion, culture, language, etc. Voyer used the term “multicultural standard” to describe the demand on societies to become inclusive. Kymlicka goes as far as saying that inclusive societies are viewed as more modern or post-modern, while those who sustain exclusion could be described as “backward, unable or unwilling to recognize and deal with the complexity and inherent pluralism of the modern world”. See De Wet & Van Vollenhoven (2015) *International Journal of Education Law and Policy* 1. See also A Voyer “Disciplined to Diversity: Learning the Language of Multiculturalism” (2011) *Ethnic and Racial Studies* 34 1874–1893. See further, T Puett “Managing Religion: Religious Pluralism, Liberalism, and Governmentality” (2013) 48 *Journal of Ecumenical Studies* 317–327; AM Brumbaugh & SA Grier “Agents of Change: A Scale to Identify Diversity Seekers” (2013) 32 *Journal of Public Policy & Marketing* 144–155.

³⁸ De Wet & Van Vollenhoven (2015) *International Journal of Education Law and Policy* 7. See also Currie & De Waal *The Bill of Rights Handbook* 251.

³⁹ De Wet & Van Vollenhoven (2015) *International Journal of Education Law and Policy* 6–7.

⁴⁰ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2002 2 SA 1 (CC) para 30. See also Currie & De Waal *The Bill of Rights Handbook* 252.

⁴¹ Currie & De Waal *The Bill of Rights Handbook* 253.

5 2 2 3 *The right to freedom*

Freedom is the ability to “make choices for oneself, being autonomous and being free from constraint”.⁴² It can also be defined as the “supreme value of liberalism”.⁴³ The right to freedom can further be described as a negative right or duty on the State to not place unreasonable obstacles in the way of an individual’s personal choices, activities and liberties.⁴⁴

The Constitution does not provide for a general right to freedom but incorporates fundamental freedoms in the Bill of Rights, such as the right to freedom and security of the person;⁴⁵ freedom of religion, belief and opinion;⁴⁶ freedom of expression;⁴⁷ freedom of association;⁴⁸ freedom of movement and residence;⁴⁹ and freedom of trade, occupation and profession.⁵⁰ The listed freedoms in the Bill of Rights relate to freedoms that are specific aspects of human life. However, these freedoms do not speak to inclusivity in the same way as the idea of human freedoms and freedom as a value do.⁵¹ For example, it would be reasonable to think that the right to freedom of expression would include the expression of identity or that the right to bodily security would provide for a self-declaration of control over an individual’s body, but it does not do this explicitly.⁵² Section 12(2) provides for the right to bodily and psychological integrity. This provision includes the right to reproductive choices, the individual’s security in and control over their body, and not to be subjected to medical and scientific experiments without consent. However, it is important to note that this list should not be regarded as a *numerus clausus* since the provision protects the right to psychological integrity as well. To read the section narrowly can negatively impact on other rights in the Bill of Rights. Against this background, the Constitutional Court has held that section 16 also does not warrant a narrow reading of the right to freedom of

⁴² De Wet & Van Vollenhoven (2015) *International Journal of Education Law and Policy* 8.

⁴³ 8.

⁴⁴ See *Ferreira v Levin* 1998 3 SA 984 (CC) para 54. See De Wet & Van Vollenhoven (2015) *International Journal of Education Law and Policy* 8. See also *De Lange v Smuts* 1998 3 SA 785 (CC) paras 22–24. See also Currie & De Waal *The Bill of Rights Handbook* 270. See also I Berlin “Two Concepts of Liberty” in I Berlin (ed) *Four Essays on Liberty* (1969) 118–172.

⁴⁵ Section 12 of the Constitution.

⁴⁶ Section 15.

⁴⁷ Section 16.

⁴⁸ Section 18.

⁴⁹ Section 21.

⁵⁰ Section 22.

⁵¹ De Wet & Van Vollenhoven (2015) *International Journal of Education Law and Policy* 8.

⁵² Section 16 protects freedom of expression but confines it to the freedom of speech. See Currie & De Waal *The Bill of Rights Handbook* 341.

expression.⁵³ To the extent that transgender children are discriminated against for the expression of their gender identity, such discrimination would arguably be in violation of their right to freedom of expression.⁵⁴ As noted above, due to the interrelatedness of the provisions of the Constitution, it would further contradict their rights to equality and human dignity to not have their gender recognised, which forms part of the expression of their core identity.

Furthermore, the right to freedom includes the ability to make decisions. In the context of children, this relates to their right to participate and to be heard. An on-going debate in respect of children's rights involves the extent to which children have the right to individual self-determination. This includes, but is not limited to, their right to choose their own lifestyle, religion, and relationships along with their gender identity.⁵⁵ Restricting these rights becomes more difficult to justify as the child grows older. The scope of parental responsibilities and the rights of the parents and the State are closely linked to the child's age.⁵⁶ Age is often used to restrict certain actions, for example, driving, marrying, and voting.⁵⁷ In the context of transgender children, age is often used to deny access to legal gender recognition. However, arguing that children under a certain age are generally too young to be aware of their gender identity can be viewed as disregarding the best interests of the child principle guaranteed in section 28 of the Constitution, Article 4 of the ACRWC, and Article 3 of the UNCRC, including their right to equality, human dignity and the freedom to express and legally live their identity.⁵⁸

5 2 2 4 *The best interests of the child*

Section 28(1) places certain duties on the State to provide children with socio-economic rights and protection against maltreatment, abuse, and degradation. In addition to section 28, section 8 of the Constitution, the application clause, states that the Bill of Rights is applicable to all organs of State, while also binding natural and

⁵³ *De Reuck v Director of Public Prosecution (Witwatersrand Local Division)* 2004 1 SA 406 (CC) paras 59 and 63.

⁵⁴ Equal Education Law Centre "Gender Identity and Sexual Orientation: Legal Review The Rights of Learners in South African Schools" (2016) *Equal Education Law Centre* <<https://eelawcentre.org.za/wp-content/uploads/2016/05/LGBTI-Final.pdf>> (accessed 24-09- 2018) 6.

⁵⁵ Currie & De Waal *The Bill of Rights Handbook* 601.

⁵⁶ 601. See also Human "The Theory of Children's Rights" in *Child Law in South Africa* 243–249.

⁵⁷ Currie & De Waal *The Bill of Rights Handbook* 234.

⁵⁸ Henzel (2016) *Humboldt Law Clinic* 15.

juristic persons should the nature of the right permit this.⁵⁹ Section 28(2) emphasises that the best interests of the child is of paramount importance in every matter concerning the child.⁶⁰ The origin of the best interests of the child and its application under international law have been discussed in Chapter 3 of this thesis.⁶¹ The principle was established in South African law in the 1940s in the case of *Fletcher v Fletcher* where the application was limited to family law and care proceedings.⁶² Today, the inclusion thereof, as formulated in section 28(2) of the Constitution, follows the international standard as set out by the UNCRC and the ACRWC.⁶³ Declercq and Verheyde, however, argue that the wording of section 28(2) is much more robust than the international standard.⁶⁴ The Constitutional Court held that:

“The word paramount is emphatic. Coupled with the far-reaching phrase “in every matter concerning the child”, and taken literally, it would cover virtually all laws and all forms of public action, since very few measures would not have a direct or indirect impact on children, and thereby concern them”.⁶⁵

The principle has become a key provision in giving meaning to certain rights in the Bill of Rights. Section 28(2) has also been used to establish the ambit and limits of other competing rights.⁶⁶ In *Minister of Welfare and Population Development v Fitzpatrick*, the Constitutional Court found that section 28(2) does not only refer to the rights set out in section 28(1), but that section 28(2) is also a right in itself, and that the best interests of the child is therefore not just a guiding principle.⁶⁷ However, despite the emphatic wording of the provision, section 28(2) does not automatically override other

⁵⁹ Currie & De Waal *The Bill of Rights Handbook* 600.

⁶⁰ The South African Constitutional Court and the Committee on the Rights of the Child have explained that the best interests of the child is a substantial right, a procedural guarantee and a principle of interpretation. *S v M* 2008 3 SA 232 (CC) para 23. See UNCRC (2016) *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, UN Doc CRC/C/GC/14 para 4. See also Currie and De Waal *The Bill of Rights Handbook* 619–623.

⁶¹ See heading 3 4 2.

⁶² 1948 1 SA 130 (A). See also Currie & De Waal *The Bill of Rights Handbook* 619.

⁶³ Skelton “Constitutional Protection of Children’s Rights” in *Child Law in South Africa* 345.

⁶⁴ M Declercq & E Verheyde “Constitutionalism of children’s rights in Belgium: A comparative perspective on section 28 of the South African Bill of Rights” in J de Groof, EFJ Malherbe & A Sachs (eds) *Constitutional Implementation in South Africa* (1996) 139. See also S Coetzee & R Mienie “The ‘best interest of the child’ standard in education; An overview of South African case law” *Southern African Public Law* (2014) 29 *SAPL* 29 90–117 93.

⁶⁵ *S v M* 2008 3 SA 232 (CC) para 25.

⁶⁶ Skelton “Constitutional protection of children’s rights” in *Child law in South Africa* 265, 280. See also *B v M* 2006 3 All SA 109 (W) para 110; *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 17. See further Coetzee & Mienie (2014) *SAPL* 90–117 98.

⁶⁷ Para 17. Skelton “Constitutional Protection of Children’s Rights” in *Child Law in South Africa* 346.

rights, which means that the best interests of the child can itself be limited.⁶⁸ In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division*, the Constitutional Court held that the word “paramount” does not mean that a child’s other rights can never be limited.⁶⁹ This finding of the court left uncertainty about the exact meaning of “paramount importance”. The issue was then taken up in *S v M* where the court confirmed that the determination of the best interests of the child will be dependent on the circumstances of each individual case.⁷⁰ This child-centred approach will require an in-depth consideration of the needs and rights of the specific child.⁷¹ In this regard, the court in *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* held that:

“A truly principled child-centred approach requires a close and individualized examination of the precise real-life situation of the particular child involved. To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned”.⁷²

Further, it is crucial that South African courts uphold the notion that an adult’s views of what the best interests of a child are can no longer override their duty to holistically respect the rights of the child. In *Heystek v Heystek* the court found that the best interests of the child standard directly contradict the antiquated Germanic and common-law parent and child relationship, and called for an attitudinal shift.⁷³ This position was also confirmed in *S v M* where Sachs J explained that:

“ [E]very child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them”.⁷⁴

⁶⁸ Skelton “Constitutional Protection of Children’s Rights” in *Child Law in South Africa* 345. See Coetzee & Mienie (2014) *SAPL* 98. See also Declercq & Verheyde “Constitutionalism of children’s rights in Belgium: A comparative perspective on section 28 of the South African Bill of Rights” in *Constitutional implementation in South Africa* 145–146. “[T]hat this provision is intended as a general guideline and not as a rule of law of horizontal application” was overridden by the Constitutional Court. *Jooste v Botha* 2000 57 2 SA 199 (T) para 210; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* para 54–55; *Sonderup v Tondelli* 2001 1 SA 1171 (CC) and *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 17.

⁶⁹ 2003 ZACC 19 para 54–55.

⁷⁰ *S v M* 2008 3 SA 232 (CC) para 18.

⁷¹ Para 23. Skelton “Constitutional Protection of Children’s Rights” in *Child Law in South Africa* 349.

⁷² *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 6 SA 632 (CC) para 48.

⁷³ 2002 2 SA 754 (T) para 46.

⁷⁴ Currie & De Waal *The Bill of Rights Handbook* 601. See also *S v M* 2008 3 SA 232 (CC) para 18.

In *Centre for Child Law v Minister for Justice and Constitutional Development* it was held that:

“What must be stressed here is that every child is unique and has his or her own individual dignity, special needs and interests. And a child has a right to be treated with dignity and compassion. This means that the child must “be treated in a caring and sensitive manner. This requires taking into account [their] personal situation, and immediate needs, age, [emphasis] gender, disability and level of maturity”. In short, “every child should be treated as an individual with his or her own individual needs, wishes and feelings”.⁷⁵

If this is correct and taking the international standards and the constitutional framework into account, all individuals, including children, should have the option to self-identify their own gender identity. This will ensure that the law or legislative framework cannot impose discriminatory prerequisites on transgender children who seek to alter their gender identity in a manner consistent with their rights to dignity, equality, freedom and especially, identity.⁷⁶ The Constitutional Court has stressed that section 28 should be regarded as responding in an “expansive way” to the country’s international obligations as a State to the UNCRC. Further, the court emphasised that the UNCRC should be seen as the international standard against which legislation and policies should be measured.⁷⁷

5 2 3 Conclusion

The Constitution and the South African courts recognise the rights of children. The case law discussed above demonstrates the courts’ positive commitment to give content and meaning to these rights. This approach demonstrates both the need to protect and promote children’s rights.⁷⁸ Despite these constitutional provisions, human rights violations against transgender children are still occurring in South Africa.⁷⁹ Research shows that transphobia leaves young transgender individuals vulnerable to

⁷⁵ *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 4 SA 222 (CC) para 47.

⁷⁶ Legal Resource Centre et al “Recognition of Civil and Political Rights: A continued struggle for Transgender and Intersex Persons in South Africa: An Alternative Report to the United Nations Human Rights Committee” *OHCHR* 9.

⁷⁷ *Sonderup v Tondelli* 2001 1 SA 1171 (CC) para 29 and *S v M* 2008 3 SA 232 (CC) para 16. See also Currie & De Waal *The Bill of Rights Handbook* 601.

⁷⁸ Skelton “Constitutional Protection of Children’s Rights” in *Child Law in South Africa* 358.

⁷⁹ WJ van Vollenhoven & CJ Els “The human rights paradox of lesbian, gay, bisexual and transgender students in South African education” (2013) *De Jure* 263 266.

mental health problems, such as depression, and increases the rates of suicide and self-harm.⁸⁰ In this context, Henzel argues that transgender children should be recognised as a vulnerable group and the State should, therefore, in term of section 7 of the Constitution, undertake special measures to reduce discrimination, violence and stigmas against them.⁸¹ Courts are willing to accept that children are capable of being autonomous, but this area must be developed further especially considering transgender children's right to self-determination in accessing legal gender recognition procedures.

5 3 The legislative framework

5 3 1 Introduction

Section 39 of the Constitution states that legislation should be interpreted in a manner that gives effect to the spirit, purport, and objects of the Bill of Rights. To promote the rights of children and the duties imposed by section 28, the State has passed legislation. The primary laws that relate to transgender children and that falls within the perimeters of this thesis, are the PEPUDA, the Children's Act, and the Alteration Act.⁸² These pieces of legislation will be discussed next.

5 3 2 The Promotion of Equality and Prevention of Unfair Discrimination Act

Section 9(4) of the Constitution requires national legislation to be enacted to prohibit and prevent unfair discrimination.⁸³ One example of such legislation, is that of the PEPUDA.

According to Currie and De Waal, the PEPUDA is "an extremely ambitious piece of legislation" that aims to eradicate "[the] social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of

⁸⁰ Council of Europe "Equal opportunities for all children: Non-discrimination of lesbian, gay, bisexual, transgender and intersex (LGBTI) children and young people" (2016) *Council of Europe* 1 7. See also Olson et al (2016) *Pediatrics* 3.

⁸¹ Henzel (2016) *Humboldt Law Clinic* 1 20.

⁸² The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 also has certain sections that relates to children, but this discussion falls outside of the scope of this thesis. See Currie & De Waal *The Bill of Rights Handbook* 600.

⁸³ The Constitution further required that the legislation must be enacted within three years of the commencement of the Constitution. See Item 23 (1) of Schedule 6 of the Constitution.

our people”.⁸⁴ The PEPUDA aims to achieve this by (i) prohibiting unfair discrimination by the State and other people; (ii) providing remedies for victims of unfair discrimination; and (iii) promoting the achievement of substantial equality.⁸⁵

Like most other pieces of legislation that aims to give effect to the Constitution, courts must assume that the PEPUDA accords to the Constitution. Further, any claim of an infringement of the right to equality must be decided under the substantive provisions and procedures of the PEPUDA.⁸⁶ Therefore, the PEPUDA must be relied on and only where a provision of the Act does not give effect to the Constitution; or where other legislation, or conduct falls beyond the ambits of the PEPUDA, may the Constitution be directly relied on. This is known as the principle of subsidiarity and states that before resorting to constitutional remedies directly, common law or legislation must be considered and relied on.⁸⁷

Chapter 2 of the PEPUDA pertains to the prevention, prohibition, and elimination of unfair discrimination, hate speech and harassment. Section 6, which echoes the provisions of section 9 of the Constitution, starts by stating that nobody may be unfairly discriminated against. Sections 7 to 9 highlights and describes certain grounds of discrimination, including race,⁸⁸ gender,⁸⁹ and disability.⁹⁰ Section 8 of the PEPUDA states that:

“Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including –

- (a) gender-based violence;
- (b) female genital mutilation;
- (c) the system of preventing women from inheriting family property;
- (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;
- (e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;

⁸⁴ Preamble of the PEPUDA.

⁸⁵ Currie & De Waal *The Bill of Rights Handbook* 244–245.

⁸⁶ *MEC for Education, KwaZulu Natal v Pillay* 2008 1 SA 474 (CC) para 40. See Currie & De Waal *The Bill of Rights Handbook* 245.

⁸⁷ Currie & De Waal *The Bill of Rights Handbook* 245.

⁸⁸ Section 7 of the PEPUDA.

⁸⁹ Section 8.

⁹⁰ Section 9.

- (f) discrimination on the ground of pregnancy;
- (g) limiting women's access to social services or benefits, such as health, education and social security;
- (h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons;
- (i) systemic inequality of access to opportunities by women as a result of the sexual division of labour".

Section 8 does not mention gender identity or diversity and related matters. The provision only supports a conventional binary interpretation and application of "gender" in its gender discrimination grounds. The section clearly only focuses on issues concerning cisgendered women,⁹¹ like female genital mutilation and pregnancy. This thesis is in no way advocating the removal of the protection of women in an already vulnerable position, but it is submitted that the legislature failed to understand the word "gender" in a holistic manner. However, the fact that the provision was written in this way should not be seen as excluding gender diversities like transgender individuals. The section uses the word "including", which is indicative of a non-exhaustive list, as explained in Chapter 3 of this thesis.⁹² Furthermore, the preamble of the PEPUDA acknowledges South Africa's obligation to consider international instruments in relation to the field of human rights.⁹³ Taking the interrelatedness of the legal framework into consideration, this would mean that transgender children are well protected against unfair discrimination on the grounds of gender in terms of the PEPUDA, as the judge attempted to illustrate in *Nare Phillemon Mphela, The South African Human Rights Commission v Kgabo Francis Manamela and Limpopo Provincial Department of Education*, discussed below.⁹⁴

⁹¹ See heading 2 2 2 for a definition of "cisgender".

⁹² See heading 3 4 4.

⁹³ Preamble of the PEPUDA:

"South Africa also has international obligations under binding treaties and customary international law in the field of human rights which promote equality and prohibit unfair discrimination. Among these obligations are those specified in the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Elimination of All Forms of Racial Discrimination".

⁹⁴ See heading 5 4.

5 3 3 The Children's Act

The Children's Act aims to give effect to section 28 of the Constitution by expanding on the application, promotion and protection of children's rights. Section 2 of Chapter 1 of the Children's Act defines the objects of the Act which, *inter alia*, are to promote the preservation of families; to give effect to the child's right to care, social services, protection from maltreatment, neglect, abuse or degradation and moral harm or hazards; and to ensure that the best interests of a child are of paramount importance in every matter concerning the child. Further, the Children's Act aims to give effect to international instruments and to provide structures, services and means for the child to develop physically, psychologically, intellectually, emotionally and socially.⁹⁵ It should be noted that the Children's Act protects the child from moral harm and provides for the development of the child.⁹⁶

Section 9 of the Children's Act states that "in all matters concerning the care, protection and well-being of a child, the standard that the child's best interest is of paramount importance, must be applied". This differs from section 28(2) of the Constitution in that the Children's Act identifies care, protection and the well-being of the child as the "matters" in which the principle must be applied. Section 7(1) of the Act expands on the best interests of the child by listing factors that must be considered when the standard is applied. These relevant factors are:

"(g) the child's-

- (i) age, maturity and stage of development;
- (ii) gender;
- (iii) background; and
- (iv) any other relevant characteristics of the child;

(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development ...

(l) the need to protect the child from any physical or psychological harm that may be caused by-

- (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or

⁹⁵ Section 2 of Chapter 1 of the Children's Act.

⁹⁶ The protection against moral harm and development is listed in the Constitution but only in terms of not exposing children to child labour or services that would risk their moral development. See section 28 (e)–(f) of the Constitution.

- (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person”

Subsections (g), (h) and (l) are of particular importance when considering the right of transgender children to legal gender recognition. Section 10 further reiterates section 7(g) in respect of child participation. It states that the child’s right to participate in any matter that concerns them should be measured by considering the child’s age, maturity and stage of development. These factors are similar to the case of *Gillick*⁹⁷ where these factors were considered to determine if a child has the competency to make decisions pertaining to themselves.⁹⁸

Furthermore, section 31 of the Children’s Act states that, before a parent makes any important decisions involving the child, due consideration must be given to the views and wishes of the child, while bearing in mind the child’s age, maturity and stage of development in mind. Subsection (b) clarifies in subsubsection (iv) that an important decision is one that is “likely to significantly change, or to have an adverse effect on the child’s living conditions, education, health, personal relations with a parent or family member or, generally, the child’s well-being.” Therefore, section 31, together with sections 7, 9 and 10, advocate that the views and wishes of transgender children should receive due consideration in the recognition of their gender identity and well-being. This thesis submits that to determine the best interests of the transgender child, the child’s gender, the child’s physical and emotional security and their intellectual, emotional, social and cultural development, and the need to protect the child from any physical or psychological harm, needs to be taken into consideration.

Section 129 of the Children’s Act provides that a child over the age of 12 may consent to their own medical treatment or surgical operations if the child is of sufficient maturity, and has the mental capacity to understand the benefits, risks, social and other implications of the treatment or operation.⁹⁹ Section 129 only requires

⁹⁷ *Gillick v West Norfolk and Wisbech Area Health Authority* [1984] QB 581 (QB), as discussed above at heading 3 4 3 2.

⁹⁸ See heading 3 4 3 2.

⁹⁹ Section 129:

“(2) A child may consent to his or her own medical treatment or to the medical treatment of his or her child if—

(a) the child is over the age of 12 years; and

(b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment.

appropriate assistance from the parents if the child, who is over the age of 12, is undergoing or wants to undergo a surgical procedure.¹⁰⁰ In the case of transgender children, such surgical intervention would refer to sex reassignment surgery and not mere medical treatment such as puberty blockers.¹⁰¹ In applying the provision to medical access for transgender children, it would mean that a child above the age of 12 may consent to undergo a medical transition in terms of stage one and stage two treatment, which should enable them to legally alter their gender in terms of the Alteration Act. Furthermore, subject to section 31 of the Children's Act, section 129(4) states that parents may consent to medical treatment if the child is under the age of 12. However, it is important to note that the WPATH recommend that transgender children start stage one treatment at the onset of puberty, which is generally around the age of 12.¹⁰²

The implications relating to the exclusion of children who cannot or do not want to undergo a medical transition, as well as the self-determination capabilities of children will be examined under the discussion of the Alteration Act and further under chapter 6 of this thesis.¹⁰³

(3) A child may consent to the performance of a surgical operation on him or her or his or her child if—

- (a) the child is over the age of 12 years; and
- (b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the surgical operation; and
- (c) the child is duly assisted by his or her parent or guardian”.

¹⁰⁰ A parent may also consent to medical treatment or surgical operation in terms of section 129 of the Children's Act. Section 46(1)(h) states that the Children's court also has the authority to order medical treatment or surgical operation of the child.

¹⁰¹ When they reach the first stage of puberty, some transgender children are prescribed puberty blockers (stage one treatment) in order to delay the onset of unwanted puberty. “... if a child receives puberty- delaying hormones (or hormone-blockers) at an early stage of puberty, followed by cross-gender hormones (stage two treatment) later in adolescence, full gender transition in adulthood is significantly less traumatic (both physically and emotionally) and generally more successful.” See E Skougard “The Best Interests Transgender Children” (2011) *Utah L Rev* 1161 1175. See also Brill & Pepper *The Transgender Child* 207.

¹⁰² The World Professional Association for Transgender Health *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 7th version (2016) 13–20.

¹⁰³ See heading 5 3 4 3 and heading 6 3.

5 3 4 The Alteration of Sex Description and Sex Status Act

5 3 4 1 *Background to the act*

Up until 1992, the Births, Marriages and Deaths Registration Act 81 of 1963 (“Births, Marriages and Deaths Registration Act”) found application in respect of the legal status of any person who has undergone a change of sex. Section 7B stated that:

“The Secretary may on the recommendation of the Secretary for Health alter, in the birth register of any person who has undergone a change of sex, the description of the sex of such person and may for this purpose call for such medical reports and institute such investigations as he may deem necessary”.

However, section 7B only provided for an alteration in the birth register and official identification documents, without referencing the initial biological sex marker. For all other purposes, the initial biological sex marker remained – especially in the case of matrimonial legislation.¹⁰⁴ The underlying reasoning for not altering the sex marker for marriage purpose was the prohibition of same-sex marriages in South Africa that existed at the time.¹⁰⁵ In 1992, section 7B of the Births, Marriages and Deaths Registration Act was amended, and section 33(3) of the 1992 Act read as follows:

“A person who was in the process of undergoing a change of sex before the commencement of this Act may on completion of the said process apply in terms of section 7B of the Births, Marriages and Deaths Registration Act, 1962, for the alteration of the sex description on the birth register”.¹⁰⁶

Therefore, those who had started the process of altering their sex prior to the commencement of the amendment in 1992, were entitled to have their sex change reflected in the birth register. However, for post-1992 sex reassignment surgeries, persons were not entitled to apply to have their sex reflected in the birth register.¹⁰⁷ The decision to amend the Births, Marriages and Deaths Registration Act 81 of 1963 by including section 33(3), was presumably based on the decision of Nestadt J, in the

¹⁰⁴ C Visser & E Picarra “Victor, Victoria or V? – A Constitutional Perspective on Transsexuality and Transgenderism” (2012) 28 *SAHRJ* 520.

¹⁰⁵ 523.

¹⁰⁶ Births and Deaths Registration Act 51 of 1992 (Third amendment of Act 129 of 1993).

¹⁰⁷ South African Human Rights Commission “Submission: Alteration of Sex Description and Sex Status Bill [37 – 2003] Portfolio Committee on Home Affairs, 9 September 2003)” *SAHRC* <<https://www.sahrc.org.za/home/21/files/10%20SAHRC%20Submission%20on%20Alteration%20of%20Sex%20Description%20and%20Sex%20Status%20Bill%20%28Parl.%29Sept%202003.pdf>> (accessed 20-03-2019). P Boberg *Law of Persons and The Family* 2 ed (1999) 209–215.

case of *W v W*.¹⁰⁸ The central question in the case was if it would be possible for a person to change their sex and still be validly married in terms of the Marriage Act 25 of 1961.¹⁰⁹ Relying on the “Ormrod Test”, from the English case of *Corbett v Corbett* 1971, the court held that a person’s sex could not be medically altered.¹¹⁰ The court’s approach amounted to a purely biological and genetic definition of sex and “ignored the real effects of human, social and psychological development”. In other words, the court lacked an understanding of gender, which, as a term, only emerged in the 1970s.¹¹¹

In 1995 the South African Law Reform Commission (“SALRC”) lodged an investigation into the Legal Consequences of Sexual Realignment and Related Matters, which then led to the process of enacting the Alteration Act along with the amendments of section 33(3) of the Births and Deaths Registration Act.¹¹²

5 3 4 2 *Alteration of Sex Description and Sex Status Bill: Hearings*

After the Alteration of Sex Description and Sex Status Bill (the “Bill”) went through all the required stages in Parliament, the Home Affairs Portfolio Committee (“Portfolio Committee”) held public hearings during September of 2003.¹¹³ Submissions were made by the South African Human Rights Commission (“SAHRC”),¹¹⁴ Cape Town Transsexual/ Transgender Support Group (“Transgender Support Group”),¹¹⁵ and the

¹⁰⁸ *W v W* 1976 2 SA 308 (WLD).

¹⁰⁹ South African Law Commission Project 52: Report on the Investigation into the Legal Consequences of Sexual Realignment and Related Matters (1995) 16–19.

¹¹⁰ 1971 83, 1970 2 All ER 33. See also Boberg *Law of Persons and The Family* 212.

¹¹¹ *W v W* 1976 2 SA 308 (WLD). See also South African Human Rights Commission “Submission: Alteration of Sex Description and Sex Status Bill [37 – 2003] Portfolio Committee on Home Affairs, 9 September 2003” SAHRC. See DK Smith “Transsexualism, sex reassignment surgery, and the law” (1971) 56 *Cornell Law Review* 963. See Matthyse *The Right to Remain Married: Positioning Homosexual-transsexual Marriages Under The South African Marriage Act 25 of 1961* 48. See heading 2 2 2.

¹¹² South African Human Rights Commission “Submission: Alteration of Sex Description and Sex Status Bill [37 – 2003] Portfolio Committee on Home Affairs, 9 September 2003” SAHRC.

¹¹³ Portfolio Committee on Home Affairs “Alteration of Sex Description and Sex Status Bill: hearing” (2003) *Parliamentary Monitoring Group* <<https://pmg.org.za/committee-meeting/2832/>> (accessed 23-05-2019).

¹¹⁴ South African Human Rights Commission “Submission: Alteration of Sex Description and Sex Status Bill [37 – 2003] Portfolio Committee on Home Affairs, 9 September 2003” SAHRC.

¹¹⁵ Cape Town Transsexual/Transgender Support Group “Alteration of Sex Description and Sex Status Bill, 2003” (2003) SAHRC <<http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2003/appendices/030909capetown.htm>> (accessed 23-05-2019).

Lesbian and Gay Equality Project,¹¹⁶ as well as individuals who have undergone a medical transition or who were in the process of undergoing a transition.¹¹⁷

The parties broadly welcomed the Bill, but also submitted a number of complaints to the Portfolio Committee. The SAHRC noted that a failure to recognise “sex reassignment” could have a significant impact on people’s lives, and since sex is reflected in official documentation, such failure violates fundamental human rights, such as human dignity, equality and freedom.¹¹⁸ They further argued that the infringements of these rights have no purpose and has a “substantial effect” on an individual’s life, which is something that could easily be changed in the legislative framework.¹¹⁹ A further objection to the proceedings as a whole was raised by the Transgender Support Group in that no transgender individuals or support groups were consulted or asked to participate during the drafting process of the Bill.¹²⁰

The objections to the Bill were primarily the same among the submissions. The first was clause 1(3) of the Bill, which proposed that reasons for refusing an application in terms of the Bill should be provided for from the Director-General who “must furnish the applicant with written reasons for that decision unless such reasons have been made public”.¹²¹ All of the parties mentioned above, found this section problematic since making such information public, could infringe the applicant’s right to human dignity and privacy. The parties all agreed that applications should be dealt with confidentially.¹²² Clause 1(3) was, therefore deleted from the Alteration Bill, in that section 3 of the Alteration Act now requires the Director-General of Home Affairs to

¹¹⁶ The Lesbian and Gay Equality Project presented an oral submission. For a summary of the submission see, Portfolio Committee on Home Affairs “Alteration of Sex Description and Sex Status Bill: Hearing” *Parliamentary Monitoring Group*.

¹¹⁷ Portfolio Committee on Home Affairs “Alteration of Sex Description and Sex Status Bill: hearing” *Parliamentary Monitoring Group*.

¹¹⁸ The South African Human Rights Commission “Alteration of Sex Description and Sex Status Bill [37 – 2003]” *pmg.org.za* <<http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2003/appendices/030909sahrc.htm>> 5 (accessed 23-05-2019).

¹¹⁹ The South African Human Rights Commission “Alteration of Sex Description and Sex Status Bill [37 – 2003]” (2003) *Parliamentary Monitoring Group* 7.

¹²⁰ Cape Town Transsexual/Transgender Support Group “Alteration of Sex Description and Sex Status Bill, 2003” *Parliamentary Monitoring Group*.

¹²¹ Alteration of Sex Description and Sex Status Bill as introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill published in GG 25236 of 23 July 2003 available at: Portfolio Committee on Home Affairs “Alteration of Sex Description and Sex Status Bill: hearing” *Parliamentary Monitoring Group* 1.

¹²² The South African Human Rights Commission “Alteration of Sex Description and Sex Status Bill [37 – 2003]” (2003) *Parliamentary Monitoring Group* 8. See also Cape Town Transsexual/Transgender Support Group “Alteration of Sex Description and Sex Status Bill, 2003” *pmg.org.za*. See further, Portfolio Committee on Home Affairs “Alteration of Sex Description and Sex Status Bill: hearing” *Parliamentary Monitoring Group* 1–8.

only present the applicant written reasons for the refusal and not to any other person.¹²³ A second issue with the Bill was that clause 1(2)(b) propose: "in the case of a person whose sex organs have been altered by surgical or medical treatment, [an applicant should] be accompanied by reports ... prepared by the medical practitioners who carried out the procedures and applied the treatment".¹²⁴ The SAHRC called for an amendment of this clause to make provision for cases where the practitioner was not available.¹²⁵ The Transgender Support Group asked that the clause should be altered, and the application should be accommodated by the applicant's own declaration of them living as a member of their preferred gender.¹²⁶ A further point was raised by the Transgender Support Group who called for the removal of requiring "reports" from medical practitioners.¹²⁷ As with the previously mentioned clause, this clause has also been amended, but not in terms of what was fully requested by the Transgender Support Group. The Alteration Act requires that an application should be accompanied by a single report from the medical practitioner who conducts the procedures or one who has experience in this regard.¹²⁸

The Lesbian and Gay Equality Project suggested that the Bill "was designed to cater specifically and exclusively for changes in sex description ... [t]he Bill aims not to allow people to change their gender identity description as they wanted".¹²⁹ Further, they noted that people do not choose to be transgender, and that "nature had imposed a different sexual identity on them".¹³⁰ Herewith, they submitted that "[g]ender identity is distinct from sex description", since the former refers to things like caring for children, "which might traditionally be thought part of a female gender identity".¹³¹ Their submission admitted that gender identity forms part of the criteria for the alteration of sex description, but it should not be a sufficient requirement thereof; and that it would not be appropriate for the State to regulate gender identity due to the fluidity of gender

¹²³ Alteration of Sex Description and Sex Status Act 49 of 2003.

¹²⁴ Alteration of Sex Description and Sex Status Bill. See also Portfolio Committee on Home Affairs "Alteration of Sex Description and Sex Status Bill: hearing" *Parliamentary Monitoring Group* 1.

¹²⁵ The South African Human Rights Commission "Alteration of Sex Description and Sex Status Bill [37 – 2003]" *Parliamentary Monitoring Group* 8.

¹²⁶ Cape Town Transsexual/Transgender Support Group "Alteration of Sex Description and Sex Status Bill, 2003" *Parliamentary Monitoring Group*.

¹²⁷ Cape Town Transsexual/Transgender Support Group "Alteration of Sex Description and Sex Status Bill, 2003" *Parliamentary Monitoring Group*.

¹²⁸ Section 2(2)(c) of the Alteration of Sex Description and Sex Status Act 49 of 2003.

¹²⁹ Portfolio Committee on Home Affairs "Alteration of Sex Description and Sex Status Bill: hearing" *Parliamentary Monitoring Group* 7.

¹³⁰ 7.

¹³¹ 7.

as a concept.¹³² Additionally, the Lesbian and Gay Equality Project highlighted that “some treatment” is a needed requirement for an application, but not necessarily surgery.¹³³ The Lesbian and Gay Equality Project further expressed that requiring an applicant to have lived in their preferred gender identity for “[t]wo years is not an onerous time requirement for living in the gender role [since] it would [then] be too easy to change sex descriptions [which] could become burdensome to the Department”.¹³⁴

It is submitted that this submission by the Lesbian and Gay Equality Project is problematic and outdated. This thesis will aim to prove in Chapter 6 that requiring “some treatment” could amount to an infringement of fundamental human rights, such as the right to equality, human dignity and freedom. Requiring treatment can be costly, which could lead to an exclusionary approach. In a third world country, the possibility of excluding individuals who are not able to afford treatment arises. Further, the requirement of treatment could violate the right to freedom of bodily integrity as guaranteed in the Constitution.¹³⁵ As previously mentioned, exclusion amounts to othering individuals, and othering individuals could lead to exposing them to unequal and undignified treatment that could possibly amount to unfair discriminatory practices.¹³⁶ Furthermore, the recommendation of extending the time requirement was, however, not included in the Alteration Act.

During the hearing, an observation was raised by the spokesperson for the African National Congress (“ANC”) “that there was no age limit for applications in the Bill and none had been put forward”.¹³⁷ The Lesbian and Gay Equality Project responded by stating that “the appropriate age would be eighteen [since it] would align the Bill with other laws”.¹³⁸ The ANC responded to this by noting that one could apply for an identification document at the age of 16, which might raise further concern.¹³⁹ Following this statement, the Lesbian and Gay Equality Project held that studies show that prior to the age of 16, sexual identity is not completely fixed and “research

¹³² 7.

¹³³ 7.

¹³⁴ 7–8.

¹³⁵ Section 12 of the Constitution.

¹³⁶ See heading 5 2 2 2.

¹³⁷ Mr W Skhosana (ANC) on Portfolio Committee on Home Affairs “Alteration of Sex Description and Sex Status Bill: hearing” *Parliamentary Monitoring Group* 7.

¹³⁸ 8.

¹³⁹ Ms Van Wyk (ANC) on Portfolio Committee on Home Affairs “Alteration of Sex Description and Sex Status Bill: hearing” *Parliamentary Monitoring Group* 8.

suggests that young children are not ready to make this decision”.¹⁴⁰ It is important to note that the studies that were referred to by the Lesbian and Gay Equality Project, were not identified or referred to during the public hearing before the Portfolio Committee.

5 3 4 3 *An analysis of the Alteration Act*

Section 1 of the Alteration Act defines gender characteristics as “the ways in which a person express his or her social identity as a member of a particular sex by using style of dressing, the wearing of prosthesis or other means”. Further, gender reassignment is defined as “a process which is undertaken for the purpose of reassigning a person’s sex by changing physiological or other sexual characteristics”. Section 2 states that:

“(1) Any person whose sexual characteristics have been altered by surgical or medical treatment or by evolvment through natural development resulting in gender reassignment, or any person who is intersexed may apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register.

(2) An application contemplated in subsection (1) must –

(a) be accompanied by the birth certificate of the applicant;

(b) in the case of a person whose sexual characteristics have been altered by surgical or medical treatment resulting in gender reassignment ... be accompanied by reports stating the nature and results of any procedures carried out and any treatment applied prepared by the medical practitioners who carried out the procedures and applies the treatment or by a medical practitioner with experience in the carrying out of such procedures and the application of such treatment;

(c) in every case in which sexual characteristics have been altered resulting in gender reassignment, be accompanied by a report prepared by a medical practitioner other than the one contemplated in paragraph (b) who has medically examined the applicant in order to establish his or her sexual characteristics”.

Therefore, the current legal framework only accommodates for transgender and intersex individuals who have undergone “gender reassignment” treatment (stage 1 or stage 2 treatment) or surgical procedures (stage 3 treatment) to legally alter their sex descriptor. This makes the application of the act very limited. The Alteration Act does not define what is meant by “natural development”. In the SALRC Report on the

¹⁴⁰ 8.

Investigation into the Legal Consequences of Sexual Realignment and Related Matters (“SALRC Report”), three groups that require sex change operations were listed. They are “transsexuals, intersexuals and little boys who have suffered penile destruction at an early age”.¹⁴¹ The SALRC Report highlighted the “unusual situation” that may occur to boys that may have “lost” their sexual organs by accident or by disease, who are then raised as girls. The Report notes that the legal consequence hereof would substantially be the same as with transsexuals, if the boy were registered as a male in the birth register.¹⁴² Thus, it is presumed that “natural developments” refer to the latter of the group.¹⁴³

Other than requiring surgical or medical treatment for the alteration of sex description, section 2(1) of the Alteration Act states that “any person ... by the involvement of natural development resulting in gender reassignment” may apply to have their sex description altered. Therefore, it could be argued that transgender children should also be permitted to alter their “sex description” in terms of the Alteration Act due to it being part of their natural development. However, this thesis submits that by following a reading down approach to interpreting the abovementioned section, the Alteration Act does not provide access to have one’s sex description altered without undergoing medical or surgical treatment. To reiterate, section 1 of the Alteration Act defines gender reassignment as “a process which is undertaken for the purpose of reassigning a person’s sex by changing physiological or other sexual characteristics, and [gender reassignment] includes any part of such a process”. Although it is correct in understanding gender identity and the development thereof as natural, in reading the Alteration Act as a whole, it is improbable to interpret the section to provide access to have one’s sex description altered without following a medicalised approach. This argument is further supported by a question raised during the Portfolio Committee hearing of the Bill, where a member of the African Christian Democratic Party requested certainty as to what is meant by the reference to “the evolvment of natural development”. Ms Cohen of the SAHRC replied “that in her research she had found a case of a South American family with a dominant gene such that male children appeared female until puberty when they grew penises and their testes descended.

¹⁴¹ South African Law Commission Project 52: Report on the Investigation into the Legal Consequences of Sexual Realignment and Related Matters 12.

¹⁴² 12.

¹⁴³ 13. See also Visser & Picarra (2012) *SAHRJ* 524.

She could not say whether this was what the drafter had in mind.”¹⁴⁴ Consequently, the presumption that “natural development” was included by the drafters of the Alteration Act seems to accord to the inclusion of the latter identified group by the SALRC Report and the group identified by the SAHRC above.

It should be noted that section 2(2)(d), that provides for an alteration of the sex descriptor, only applies to intersex individuals. Section 2(2)(d) states that an application contemplated in terms of the Act must:

“[I]n the case of a person who is intersex, be accompanied by –

- (i) a report prepared by a medical practitioner corroborating that the applicant is intersex; and
- (ii) a report prepared by a qualified psychologist or social worker corroborating that the applicant is living and has lived stably and satisfactorily for an unbroken period of at least two years in the gender role corresponding to the sex description under which he or she seeks to be registered”.

Therefore, there is no prerequisite time requirement for transgender individuals in the Alteration Act, but only for intersex individuals. Importantly, the Act holds a conflated understanding of intersexism by using terminology such as “gender role”. As highlighted in Chapter 2 of this thesis, intersexism is a sexual characteristic, which means that the Act should state it as “sex role”.¹⁴⁵ Nevertheless, subjecting a human being to live and prove their gender identity or sex descriptor for a certain time period, could amount to being onerous and degrading treatment. Subsequently, a potential avenue to explore is to implement quick, transparent, and accessible mechanisms for legal gender and sex recognition procedures for transgender and intersex individuals.¹⁴⁶

Furthermore, the Alteration Act does not expressly mention an age requirement. However, upon reading the Alteration Act in conjunction with section 129 of the Children’s Act and the WPATH, children can start stage 1 treatment upon reaching the age of 12, which would meet the application requirements as set out in section 2

¹⁴⁴ Portfolio Committee on Home Affairs “Alteration of Sex Description and Sex Status Bill: hearing” *Parliamentary Monitoring Group*.

¹⁴⁵ See heading 2 2 1.

¹⁴⁶ See heading 3 3 and heading 7 2.

of the Alteration Act.¹⁴⁷ Thus, in order for a child to have their gender identity legally recognised, they have to reach the age of 12 and undergo medical treatment. As previously noted in Chapter 3, there is a duty on the State to respect, protect and promote the gender identity of all children irrespective of their age.¹⁴⁸ Chapter 4 highlighted the foreign perspective which calls for “quick, transparent and accessible” mechanisms for having one’s gender identity recognised without medical prerequisites or minimum age requirements.¹⁴⁹ The question arises as to whether the Alteration Act has gone far enough to ensure the foundational values of human dignity, equality and freedom as set out in section 1 of the Constitution for all transgender individuals.

5 3 5 The Births and Death Registration Act and the Identification Act

As previously mentioned, the Alteration Act amended the Births and Deaths Registration Act, 1992. Section 4 of the Alteration Act states that provisions for the alteration of sex description should be inserted in section 27A of the Births and Deaths Registration Act. Section 27A states that:

- “(1) If the Director-General grants an application or a magistrate issues an order in terms of section 2 of the Alteration of Sex Description and Sex Status Act, 2003, the Director-General shall alter the sex description on the birth register of the person concerned.
- (2) An alteration so recorded shall be dated and after the recording of the said alteration the person concerned shall be entitled to be issued with an amended birth certificate”.

Therefore, once an alteration has been granted by either the Director-General or Magistrate, a new birth certificate should be issued that reflects their correct particulars of the person to who it was issued. Due to the relationship between the relevant pieces of legislation, an amendment to the birth certificate would effectively call for the applicants’ identification document to be amended accordingly.

The Identification Act, 1997, regulates the compilation and maintenance of the population register of South Africa. Section 7 of the Identification Act requires that an identification number should be assigned to all persons who are South African citizens

¹⁴⁷ See heading 3 3 for a discussion on section 129 of the Children’s Act. See also The World Professional Association for Transgender Health *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 7th version (2016) 13–17.

¹⁴⁸ See heading 3 4 5.

¹⁴⁹ See heading 4 3.

and persons who are lawfully and permanently resident in the Republic.¹⁵⁰ The Identification Act requires that an identification number should comprise figures and codes that represent the person's date of birth, gender, and whether they are a South African Citizen or not. Further, section 8 states that the identification number (referred to in section 7), the surname and forenames, gender, date of birth, the place and country where they were born should be recorded in the population register. Noteworthy is the fact that the Identification Act requires an individual's gender, and not sex, to be recorded in their identification number and within the public register. Contradictory hereto, the Births and Deaths Registration Act prescribes that one's sex should be recorded on the birth certificate, which alludes to the abovementioned conflation within the legislative framework.¹⁵¹ Further, the Identification Act includes provisions for the correction of an identification document that does not reflect the particulars of a person correctly. Section 19 of the Act states that the incorrect document should be handed over to the Director-General who shall then, without any delay, cancel the incorrect identification document and replace it with documentation that reflects the correct particulars of the person.

5 4 Nare Phillemon Mphela v Kgabo Francis Manamela and Limpopo Provincial Department of Education

The first and only relevant judgment in South Africa pertaining to the rights of transgender children, at the time of writing this thesis, is the unreported judgment of *Nare Phillemon Mphela, The South African Human Rights Commission v Kgabo Francis Manamela and Limpopo Provincial Department of Education*.¹⁵² The case was heard in the Equality Court for the District of Seshego.

The facts of the case were that Nare Mphela (the complainant), had previously lodged a complaint in 2015 at the same court but the presiding officer was of the opinion that her case did not fall within the ambit of the PEPUDA.¹⁵³ Thereafter, she

¹⁵⁰ See also section 3 of the Identification Act.

¹⁵¹ See heading 5 2 2 1.

¹⁵² *Nare Phillemon Mphela, The South African Human Rights Commission v Kgabo Francis Manamela and Limpopo Provincial Department of Education* (2017) <<http://www.fedsas.org.za/files/Documents/Regsdokumente/F%20Hofuitsprake/South%20African%20Human%20Rights%20Commission%20v%20Kgabo%20Francis%20Manamela%2C%20Provincial%20Head%20of%20Department%20and%20others.DOCX>> (accessed 09-08-2018).

¹⁵³ *Nare Phillemon Mphela, The South African Human Rights Commission v Kgabo Francis Manamela and Limpopo Provincial Department of Education* (2017)

sought assistance from the Human Rights Commission who then lodged a second complaint. The complainant testified that she was subjected to verbal and physical abuse and humiliation by the hands and deeds of the first respondent who was the principal of the school she was enrolled in. This included a beating with a stick, blocking of entry into the class and also humiliation in the classroom. This then led to the complainant not obtaining her matric. She testified that she felt that the school system failed her in acknowledging her personal situation and in providing her with a safe and comfortable environment.¹⁵⁴ Although the judgment is welcomed, it is submitted that the court erred in several aspects.

The judgment itself is not lengthy because the court did not want to repeat the evidence dealt with in the court. The court noted that it was aware of the complainant's "born sex" and her "sexual personal identity". The complainant testified that she identified as a girl from an early age and that she did this socially as well by dressing as a girl, and using the girls' bathrooms accordingly. The court stated that it "is cautious and sensitive to these facts ... [h]owever, being a court that deals with facts, the court will refer, where necessary, to the complainant in the male form".¹⁵⁵ The court failed to respect and promote the complainant's fundamental human rights to human dignity, equality and freedom by opting to refer to her "in the male form".¹⁵⁶ Furthermore, the court lacked an understanding of *gender* and *sex* in that it focussed on her sex and sexual personal identity rather on her gender and gender identity.

<<http://www.fedsas.org.za/files/Documents/Regsdokumente/F%20Hofuitsprake/South%20African%20Human%20Rights%20Commission%20v%20Kgabo%20Francis%20Manamela%2C%20Provincial%20Head%20of%20Department%20and%20others.DOCX>> (accessed 09-08-2018).

¹⁵⁴ Nare Phillemon Mphela, *The South African Human Rights Commission v Kgabo Francis Manamela and Limpopo Provincial Department of Education* (2017) <<http://www.fedsas.org.za/files/Documents/Regsdokumente/F%20Hofuitsprake/South%20African%20Human%20Rights%20Commission%20v%20Kgabo%20Francis%20Manamela%2C%20Provincial%20Head%20of%20Department%20and%20others.DOCX>> (accessed 09-08-2018).

¹⁵⁵ Nare Phillemon Mphela, *The South African Human Rights Commission v Kgabo Francis Manamela and Limpopo Provincial Department of Education* (2017) <<http://www.fedsas.org.za/files/Documents/Regsdokumente/F%20Hofuitsprake/South%20African%20Human%20Rights%20Commission%20v%20Kgabo%20Francis%20Manamela%2C%20Provincial%20Head%20of%20Department%20and%20others.DOCX>> (accessed 09-08-2018).

¹⁵⁶ For example:

"He testified about his school years and the hardships and challenges which led him to enrol for his grade 11 and subsequent grade 12 at the school. He testified that he identified himself to be a girl from an early age. In his family and immediate community. That is how he lived. At the school he also identified himself to be a girl. He dressed accordingly and used the girls' bathrooms accordingly. He admitted that sometimes he would be late and not attend school hours fully".

The court found that she succeeded in proving that her complaint fell within the ambit of section 10 of the PEPUDA.¹⁵⁷ The court then concluded by remarking that the first respondent failed to create a safe, protective, stress-free environment for learners given the fact that he is tasked to look after the wellbeing of all learners in his school.¹⁵⁸

Although it is a short judgment, and to reiterate, welcomed, the judgment illustrates the unwillingness or incompetence of courts to have the necessary empathy or understanding required in recognising the rights of transgender children. When the complainant lodged her first complaint in 2015, the presiding officer believed her case fell outside the ambit of the PEPUDA.¹⁵⁹ Judges evidently do not always have a thorough understanding of the relevant legislative framework, which could stem from the conflation between gender and sex across the South African legislative framework.

It is therefore submitted that the duty of recognising the child's gender identity cannot be placed on courts. This approach will go against the envisioned best practices of having quick, easy, and accessible mechanisms in place for transgender children. Court proceedings can be long, expensive, and inaccessible for some, which could lead to further infringements of rights. Further, in some cases courts may not have the necessary understanding and empathy in respect of transgender children, as seen from the abovementioned case.

¹⁵⁷ Section 10 states that:

“(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-

(a) be hurtful;
(b) be harmful or to incite harm;
(c) promote or propagate hatred.

(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21 (2) (n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation”.

¹⁵⁸ Nare Phillemon Mphela, The South African Human Rights Commission v Kgabo Francis Manamela and Limpopo Provincial Department of Education (2017) <<http://www.fedsas.org.za/files/Documents/Regsdokumente/F%20Hofuitsprake/South%20African%20Human%20Rights%20Commission%20v%20Kgabo%20Francis%20Manamela%2C%20Provincial%20Head%20of%20Department%20and%20others.DOCX>> (accessed 09-08-2018).

¹⁵⁹ Nare Phillemon Mphela, The South African Human Rights Commission v Kgabo Francis Manamela and Limpopo Provincial Department of Education (2017) <<http://www.fedsas.org.za/files/Documents/Regsdokumente/F%20Hofuitsprake/South%20African%20Human%20Rights%20Commission%20v%20Kgabo%20Francis%20Manamela%2C%20Provincial%20Head%20of%20Department%20and%20others.DOCX>> (accessed 09-08-2018).

5 5 Conclusion

The analysis of the South African legal framework indicate that the protection and promotion of transgender children's rights regime requires further development. Much more should be done to ensure a holistic enabling environment for transgender children that accords to the already established constitutional values and international standards. In order to give effect to the objects of the Bill of Rights to transform the South African society as a whole, the fundamental rights set forth in the Bill of Rights must be applied as an interconnected whole to ensure that the human dignity, equality and freedom of all people regardless of their age or gender identity are protected thereunder.

If a true application of substantive equality is to be met, transgender children's rights need to be granted greater promotion and protection, especially in light of recognising their gender identity legally without prescribing medical or age prerequisites. The legislative framework is predominantly focussed on a binary and medicalised understanding of the sex and gender categories which is problematic in that it contradicts the foundational values system set out in the Constitution by working with narrow definitions that excludes various other groups such as transgender children.

The constitutionality of the scope and limitations of transgender children's rights, within the South African legal framework, will be scrutinised in Chapter 6. Further, Chapter 6 will compare the South African implementation of the rights of transgender children to the best practices envisioned by the international and foreign standards relating to the topic.

CHAPTER 6: DETERMINING A RIGHT TO LEGAL GENDER RECOGNITION FOR TRANSGENDER CHILDREN IN SOUTH AFRICA

6 1 Introduction

In considering the standard set by international and regional laws, best practices adopted by foreign jurisdictions, and the current legal status of transgender children in South Africa, this chapter will start by determining if transgender children do indeed have a right to legal gender recognition in terms of the South African legal framework. This will be done by considering the duties placed on the State in relation to protecting and promoting the rights of transgender children in terms of the Constitution, as well as international and regional law. Furthermore, this chapter will aim to establish that the underlying assumptions of this thesis are in actuality true in that the current legal framework does not give effect to the spirit, purport and objects of the Constitution because it restricts transgender children from accessing legal gender recognition. It will be shown that the limitation upon these rights is not reasonable and justifiable in an open and democratic society based on the rights of human dignity, equality and freedom for all and is not in the best interests of transgender children.

6 2 A right to legal gender recognition for children?

6 2 1 Introduction

The importance of access to legal gender recognition for transgender children has been described and interpreted throughout this thesis. To reiterate, legal gender recognition refers to the official recognition of gender identity in official documents.¹ The following subsections aim to investigate if and how transgender children have a right to legal gender recognition, while considering the fact that it is in their best interests to have their gender identity legally recognised as a right without any unconstitutional legislative, age and medical prerequisites in terms of their right to equality, human dignity, and freedom.

6 2 2 The right to equality

The South African Constitution provides all citizens the right to equal treatment before the law and a right to equal protection and benefit from the law; defining equality as

¹ See heading 1 2.

the “full and equal enjoyment of all rights and freedoms”.² Yet, as previously mentioned, transgender children still bear the brunt of inequality, unfair discrimination, exclusion, violence, marginalisation and stigmatisation.³ Chapter 5 of this thesis discussed the formalities of the right to equality under section 9 of the Constitution. Therefore, it is necessary to establish if transgender children have a right to have their gender identity legally recognised, based on their right to equality, as enshrined by the Constitution and international law.

The right to equality is not explicitly mentioned in the UNCRC or the ACRWC, but these instruments have non-discrimination provisions, which requires persons to be treated with equal respect and concern. As explained in Chapter 3 of this thesis, Article 2 of the UNCRC protects the rights of transgender children to non-discrimination in its inclusion of “other status” in the listed grounds. Principle 2 of the Yogyakarta Principles define discrimination as any distinction, exclusion or restriction based on SOGIESC that has the effect of nullifying equality before the law. The protection measures provided under Article 2 of the UNCRC places a duty on Member States to respect and ensure the rights enshrined in the Convention to every child within their jurisdiction, which includes transgender children, as it was established in General Comment 15.⁴ Article 3 of the ACRWC states that “[e]very child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child’s race ... birth or other status”. Like the UNCRC, the ACRWC does not include gender as a listed ground in its non-discrimination clause, but there should be no reason as to why “gender” cannot be inferred in the provision under “other status”. As discussed in Chapter 3, interpreting the provisions in this manner will be consistent with the *ejusdem generis* doctrine as proposed in General Comment 15, and further, give effect to the principle of universality and non-discrimination.⁵

A right to non-discrimination based on gender identity means that South Africa has an obligation to ensure that transgender children’s right to equality is protected and promoted. If equality means that everyone should have equal enjoyment of all rights

² Section 9(2) of the Constitution.

³ See heading 5 2 2 1.

⁴ UN Committee on the Rights of the Child (UNCRC), General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, UN Doc CRC/C/GC/15. See heading 3 4.

⁵ See heading 3 4 4 1. See also UN Committee on the Rights of the Child (UNCRC), General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, UN Doc CRC/C/GC/15.

and freedoms, then there should not be any eligibility criteria, such as medical or psychological interventions and minimum age requirements as prerequisites to access equal protection and benefit of the law, especially in relation to the recognition of an individual's identity, which is one of the most fundamental aspects of what it means to be human.

The right to equality is a substantial right that entails inclusion.⁶ If the right to equality aims to promote inclusion, then the PEPUDA is restrictive and too narrowly drafted when considering transgender children's right to legal gender recognition. Section 8 prohibits discrimination based on gender but postulates a conventional binary interpretation of gender that only focusses on cisgender women. This is again proof of a misunderstanding of the term "gender" as a whole.⁷ This provision does, however, use the word "including" which indicates that it does not have a restricted application. It is also evident that section 8 of the PEPUDA does include gender identity as seen from the case of *Nare Phillemon Mphela, The South African Human Rights Commission v Kgabo Francis Manamela and Limpopo Provincial Department of Education*.⁸ Nevertheless, it is submitted that the provision's expansion on "gender discrimination" becomes redundant if it fails to mention gender identity explicitly as being part of gender discrimination.

Furthermore, section 9(3) of the Constitution explicitly mentions "gender" as a prohibited ground for discrimination. This thesis submits that it would be highly improbable to find that the listed ground "gender" would not include one's gender identity in terms of the Constitution. This proves that there is indeed a right to gender identity in terms of the right to equality.

⁶ Currie & De Waal *The Bill of Rights Handbook* 213.

⁷ Chapter 5 provided an example hereof under the case discussion of *Nare Phillemon Mphela, The South African Human Rights Commission v Kgabo Francis Manamela & Limpopo Provincial Department of Education* where the claimant's first claim was unsuccessful due to the presiding officers' opinion that gender identity does not fall within the ambits of the PEPUDA. See heading 5 4 See *Nare Phillemon Mphela, The South African Human Rights Commission v Kgabo Francis Manamela & Limpopo Provincial Department of Education* (2017) <<http://www.fedsas.org.za/files/Documents/Regsdokumente/F%20Hofuitsprake/South%20African%20Human%20Rights%20Commission%20v%20Kgabo%20Francis%20Manamela%2C%20Provincial%20Head%20of%20Department%20and%20others.DOCX>> (accessed 09-08-2018).

⁸ *Nare Phillemon Mphela, The South African Human Rights Commission v Kgabo Francis Manamela & Limpopo Provincial Department of Education* (2017) <<http://www.fedsas.org.za/files/Documents/Regsdokumente/F%20Hofuitsprake/South%20African%20Human%20Rights%20Commission%20v%20Kgabo%20Francis%20Manamela%2C%20Provincial%20Head%20of%20Department%20and%20others.DOCX>> (accessed 09-08-2018). See heading 5 4.

Clearly, transgender children's right to equal treatment and non-discrimination are protected in term of the national and international legal framework. The question now remains if the South African Alteration Act gives effect to transgender children's right to equality. It is evident in terms of section 9 of the Constitution that everyone has the right to equality. However, fundamental rights and freedoms provided for in the Constitution are not absolute, and for the right to equality to be infringed, there has to be a form of unfair discrimination. A systematic test for determining unfair discrimination was set out by the Constitutional Court in *Harksen v Lane NO*.⁹ Before investigating the constitutionality of the Alteration Act, it is, however, necessary to first consider how the rights to human dignity and freedom, as well as the best interests of the child, contribute to establishing the right of the transgender child to legal gender recognition.

6 2 3 The right to human dignity and the right to development

Similar to the right to equality, the right to human dignity is a guiding mechanism towards the inclusion of people, in that it recognises that all people are entitled and worthy of equal respect and concern.¹⁰ This is especially relevant to marginalised, stigmatised and victimised groups or individuals.

It has been established that any occurrence of "othering" people leads to a violation of rights.¹¹ Any "othering" that happens in society implies exclusion, oppression, inequality, discrimination, violence, marginalisation, and stigmatisation, which violates the victims right to dignity. Realising the human dignity of all individuals means to accept others as human beings, who are as dignified and worthy as everyone else. The respect of everyone's human dignity further consists of the recognition that every person is able to make their own individual choices, and it is only through the recognition and application of the self-declaration model, that this aspect can be realised for transgender children in terms of recognising their gender identity.¹² Thus, in order to protect transgender children from undignified treatment, their right to gender identity needs to be legally recognised. The duty to protect and promote the dignity of

⁹ *Harksen v Lane NO* 1998 1 SA 300 (CC). See heading 5 4.

¹⁰ Currie & De Waal *The Bill of Rights Handbook* 249–250. See also De Wet & Van Vollenhoven "Inclusivity: Applications of dignity, equality and freedom" (2015) 7 *International Journal of Education Law and Policy* 6.

¹¹ See heading 5 2 2 2.

¹² Currie & De Waal *The Bill of Rights Handbook* 253.

every other individual, regardless of their age and gender, is a duty of the State in terms of the Constitution and international law.

As discussed above in Chapter 3, the UNCRC and the ACRWC conjoin the child's right to development with their right to life and survival.¹³ The right to life and survival are fundamental preconditions for the realisation and enjoyment of any other rights, particularly the right to human dignity.¹⁴ In *S v Makwanyane* the court referred to the right to life and dignity as "twin rights" that are essential for all other rights under the Constitution.¹⁵ In terms of international law, there is a heavily emphasised duty on the State to ensure the child's right to development: Article 6 of the UNCRC and Article 5 of the ACRWC obliges States to ensure to the maximum extent possible the survival and development of the child; Article 18 of the UNCRC and Article 20 of the ACRWC places a duty on States to use their best efforts to ensure that parents meet their responsibilities of providing for the upbringing and development of the child; and Article 21 of the ACRWC places a duty on States "to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular those customs and practices prejudicial to the health or life of the child; and those customs and practices discriminatory to the child on the grounds of sex or other status". The transgender child's right to development is a right in which all human rights and fundamental freedoms can be fully realised, and it also forms part and should be considered when considering the best interests of the child. Yet many transgender children, who are the subjects of the right to development, still live in need of the recognition and fulfilment of their entitlement to the right to human dignity, equality, and freedom.¹⁶

Another primary duty of the State in terms of international law and the Children's Act is to eliminate harmful social and cultural practices affecting the child's welfare, human dignity, growth, and development.¹⁷ The welfare of the child includes the child's

¹³ See heading 3 3 2.

¹⁴ Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* 119.

¹⁵ *S v Makwanyane* 1995 3 SA 391 (CC) para 84.

¹⁶ United Nations Human Rights office of the High Commission "Development is a Human Right" *OHCHR* <<https://www.ohchr.org/EN/Issues/Development/Pages/Introduction.aspx>> (accessed 09-05-2019).

¹⁷ Article 21 of the ACRWC; paras 3–12 of the Declaration on the Rights of the Child 1979 and the Preamble of the Children's Act. See also Schäfer *Child law in South Africa: Domestic and international perspectives* (2011) 94.

right to health, which includes the mental health of the child.¹⁸ As highlighted in Chapter 2 of this thesis, by not allowing transgender children to express their true innate self, could have negative effects on their mental health and future life chances.¹⁹ Applying this duty to transgender children means that South Africa has a duty to respect and protect their gender identity because gender identity is tied to the child's welfare, growth and development. Furthermore, in terms of Article 8 of the UNCRC, the South African State has a duty to respect the child's right to preserve their identity by providing them with appropriate protection where they are illegally deprived of elements of their identity. Needless to say, "elements of identity" would include gender identity. A potential avenue for lowering the risk of exposing the child to harmful practices and human rights violations, or eliminating it entirely, would be to provide them access to legal gender recognition as an enforceable right.

Providing children access to legal gender recognition has the potential to ensure the holistic development of the transgender child and allow them to grow up in an environment and atmosphere of happiness, love and understanding that would protect and promote their gender identity. A right to legal gender recognition for children will also give effect to the promotion and protection of the transgender child's right to human dignity that recognises that all humans are equally recognised, which promotes dignified treatment for all; and aims to eliminate all forms of human rights violations.

6 2 4 Fundamental freedoms and the child's right to autonomy

Similarly, to the right to human dignity, the right to freedom has a comprehensive meaning. It refers to the ability to make self-determined and independent choices.²⁰ The right to freedom is commonly linked to freedom of expression, association, choice and bodily autonomy. The right to freedom further includes the right of the child to be able to participate, which is a fundamental aim in modern child law instruments. As stated in Chapter 3, the right to participate further aligns with the right to autonomy, which holds critical competence and the capacity for reasoning.²¹

¹⁸ United Nations Human Rights office of the High Commission "The right mental health" www.ohchr.org/EN/Issues/Health/Pages/RightToMentalHealth.aspx (accessed 09-05-2019).

¹⁹ See heading 2 5.

²⁰ De Wet & Van Vollenhoven (2015) International Journal of Education Law and Policy 8.

²¹ Freeman "The Value and Values of Children's Rights" in *The Human Rights of Children: From Visions to Implementation* ch 1 30. See heading 3 4 3 1.

Freeman argues that if children are allowed to participate by exercising their right to autonomy, only then are they treated as a person that bears rights.²² Though it is true that granting a child limitless autonomy could increase the risks of exposing the child to harming their life chances, it should, however, also be recognised that the right to freedom also entails a negative duty to not place unreasonable obstacles in the way of the child's autonomy that impairs their fundamental human rights and freedoms.²³ For transgender children, this would mean that their self-determination capabilities should not be limited with unreasonable medical prerequisites and unreasonable age requirements in accessing legal gender recognition, since recognising the gender identity of a transgender child would not expose them to risks that could harm their life chances. In fact, what makes these eligibility criteria unreasonable, is the fact that it exposes the child to harmful practices that affect their welfare, human dignity, growth and development in that the existing prerequisite criteria actually expose the child to risks of harming their life chances, as explained in Chapter 1 that transgender children are at risk of suicide and self-harm.²⁴

Article 12 of the UNCRC obliges South Africa to ensure that children can express their views and are heard. Further, as explained in Chapter 5, the Children's Act further adds that due consideration should be given to the child's views.²⁵ The question that arises is why transgender children are not heard where the recognition of their gender identity is concerned. In order to give effect to Article 12 of the UNCRC and the Children's Act, transgender children should be able to use their own declaration of choice in relation to their gender identity, since the legal recognition hereof would be in the best interests of the transgender child's "physical and emotional security and [their] intellectual, emotional, social ... development", while also protecting the child from "physical and psychological harm that may be caused by ... maltreatment, abuse, neglect ... degradation ... or other harmful behaviour".²⁶ As explained in Chapter 3, General Comment 12 further strengthens the argument that the child's right to be

²² Chapter 1, 30.

²³ *Ferreira v Levin* 1998 3 SA 984 (CC) para 54. See De Wet & Van Vollenhoven (2015) *International Journal of Education Law and Policy* Special Edition 8. See also *De Lange v Smuts* 1998 3 SA 785 (CC) paras 22–24. See also Currie and De Waal *The Bill of Rights Handbook* 270. See also Berlin "Two Concepts of Liberty" in *Four Essays on Liberty* (1969) 118–172.

²⁴ See heading 1 1.

²⁵ Section 10 of the Children's Act. See heading 5 3 3.

²⁶ Section 7(h) and (l) of the Children's Act. UN Committee on the Rights of the Child (UNCRC), *General Comment No. 13 (2011): The right of the child to freedom from all forms of violence*, 18 April 2011, CRC/C/GC/13, available at: <<https://www.refworld.org/docid/4e6da4922.html>> (accessed 18-03-2019).

heard and to participate should also not be limited by prerequisite legislative measures in order to access a basic or rather fundamental right such as gender identity.²⁷

Section 12 of the Constitution states that “everyone has the right to freedom and security of the person” and “everyone has the right to bodily and psychological integrity, which includes the right ... to security and control over their body”. Yet, the Alternation Act requires that in order to have one’s gender identity legally recognised, one should first be scrutinised and undergo a bodily (medical) transition before accessing freedom and other fundamental human rights, which is definitely a constraint and unreasonable obstacle when aiming to access inclusion, acceptance and recognition before the law. If children are truly recognised, as explained by Sachs J, as individuals with their own dignity, and as individuals with distinctive personalities, their fundamental freedoms must be recognised, protected and promoted.²⁸ Therefore, all children, regardless of their age or gender, should have the option to self-identify. It is only then that transgender children will truly be recognised as citizens living in an open and democratic society based on the rights to human dignity, equality and freedom for all.

6 2 5 The best interests of the transgender child

In giving effect to the abovementioned rights of transgender children, considering their best interests is crucial. Ever since the best interests of the child has been recognised as both a guiding principle and right, the rights of children have continually been developed.²⁹ There is a duty in terms of international law, the Constitution and the Children’s Act to always consider the best interests of the child in all actions that concern them. This thesis argues that if the best interests of transgender children are considered, it would naturally call for further and continuous development of children’s rights.

As noted in Chapter 5, the best interest principle does not override other rights, therefore it can be limited.³⁰ In *S v M* and *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* the courts confirmed the

²⁷ UN Committee on the Rights of the Child (UNCRC), *General Comment No. 13 (2011): The right of the child to freedom from all forms of violence*, 18 April 2011, CRC/C/GC/13, available at: <<https://www.refworld.org/docid/4e6da4922.html>> (accessed 18-03-2019). See heading 3 4 3.

²⁸ *S v M* 2008 3 SA 232 (CC) para 18.

²⁹ *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 17. Skelton “Constitutional Protection of Children’s Rights” in *Child Law in South Africa* 346.

³⁰ See heading 5 2 2 4.

international position that the act of considering the best interests of the child is a child-centred approach that requires an in-depth consideration of the needs and rights of the specific child.³¹ In establishing the best interests of the transgender child, this thesis has argued that it would be in the child's best interests to have their gender identity legally recognised in protecting, promoting and respecting their right to equal and dignified treatment, and their right to freedom and autonomy. Section 7 of the Children's Act requires that the child's "gender, background, any other relevant characteristics", "physical and emotional security" and their "emotional and social development" needs to be considered, while protecting the child from "physical or psychological harm". Based on the analysis of the rights, the relevant factors to consider above, and in light of a child-centred approach, it is evident that the approach to not provide children access to legal gender recognition, fails to take the transgender child's best interests into consideration.

6 2 6 Conclusion

In considering the rights identified above, it is evident that transgender children are entitled to equal opportunities and protection to have their human dignity respected and should be free to live in accordance with their gender identity. To reiterate, in terms of sections 39 and 233 of the Constitution, there is a duty to prefer a reasonable interpretation of the Bill of Rights and legislation that is consistent with international law. However, when the legislative framework, such as the Alteration Act, limits transgender children's rights to have recognition in terms of the law, the question arises if these restrictions and eligibility criteria are reasonable and justifiable in an open and democratic society.

6 3 Determining the constitutionality of the Alteration Act

As mentioned in Chapter 5, for legislation to be enforceable, it has to meet the threshold requirement of giving effect to the spirit, purport and objects of the Bill of Rights; and any limitation on the Bill of Rights must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.³² Any

³¹ *S v M* 2008 3 SA 232 (CC) para 18. See also *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 6 SA 632 (CC) para 48.

³² Section 39(2) and 36(1) of the Constitution. See heading 5 3 1.

form of differentiation between individuals or groups triggers scrutiny under section 9(1) of the Constitution. Thus, in applying the threshold test to the study, it is clear that transgender children are differentiated, based on a few of the prohibited grounds listed under section 9(3), that is, sex, gender and age.

As previously mentioned in Chapter 5, the Constitution does not prohibit discrimination; it prohibits *unfair* discrimination. Section 9(3), read together with section 9(4), states that no person may unfairly discriminate against anyone on one or more of the listed grounds. In *Harksen v Lane NO* the Constitutional Court held that the specified prohibited grounds under section 9(3) have previously been used to “categorise, marginalise and often oppress” individuals, while also having the potential to attack the inherent right of human dignity.³³ As illustrated throughout this thesis, transgender children often bear the brunt of marginalisation and oppression.³⁴ Prohibiting transgender children from accessing legal gender recognition and not allowing them to socially transition, violates their human dignity, equality and fundamental freedoms. Therefore, it is evident that the differentiation experienced by transgender children amounts to discrimination since the differentiation is on prohibited grounds. If the discrimination is based on a listed ground, it is presumed to be unfair in terms of section 9(5) unless it is established that the discrimination is fair. The test for determining unfairness was set out in *Harksen v Lane NO*. In terms of this test, the following factors must be considered:

- “(a) The position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground;
- (b) The nature of the provision or power and the purpose sought to be achieved by it. If its purpose is aimed at achieving a worthy and important societal goal and not at impairing the complainant, it may be fair;
- (c) With due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature”.³⁵

³³ *Harksen v Lane NO* 1998 1 SA 300 (CC) para 49.

³⁴ See heading 1 1.

³⁵ *Harksen v Lane NO* 1998 1 SA 300 (CC) para 51.

The determining factor for making discrimination unfair is the impact of the discrimination on its victims, with the primary right and value important for determining unfairness being dignity.³⁶ The Constitutional Court has also stressed that the test for unfairness is not a closed list of factors and that the test may be developed further over time. Each case needs to be objectively assessed; therefore, a contextual approach is to be followed.³⁷ To ensure a thorough contextual enquiry, the first leg of the abovementioned test requires that the history, disadvantage and harm, socio-economic factors and the many forms that inequality takes, needs to be taken into consideration. According to Albertyn, this approach allows for a “sophisticated impact enquiry”.³⁸ Regarding the historical factors to be taken into account, the history of the entire LGBTQI community’s struggle for recognition within the legal framework proves the historical patterns of disadvantage and harm due to unjust laws and practices. As with all of the listed grounds, this is prevalent through the recognition of gender and sexual orientation in section 9(3).³⁹ However, taking the historical factors into consideration should not be a rigid requirement. Courts need to be aware of the social changes that do not reflect in historical practices such as with transgender children. As the Court recognised in *Bhe v Khayelitsha Magistrate*, the law is not static; it needs to evolve.⁴⁰

Establishing unfairness involves considering the position of the complainant in society. To reiterate, the vulnerability of children, and more specifically transgender children, was highlighted throughout this thesis. In *President of the Republic of South Africa v Hugo*, O’Regan J held that there are different degrees to vulnerability and that “the more vulnerable the group adversely affected by the discrimination, the more the discrimination will be held to be unfair”.⁴¹ Not allowing transgender children recognition to be their true innate self, makes them very susceptible to experiencing vulnerabilities and undignified treatment such as stigmatisation, marginalisation, victimisation, maltreatment, abuse and degradation within the societal context. These vulnerabilities have the potential to impair the rights and interests of transgender children.

³⁶ Currie and De Waal *The Bill of Rights Handbook* 223. See also Albertyn & Goldblatt “Equality” in Woolman & Bishop (eds) *CLOSA* 35–76.

³⁷ *Harksen v Lane* NO 1998 1 SA 300 (CC) para 51.

³⁸ Albertyn & Goldblatt “Equality” in *Constitutional Law of South Africa* 35–76.

³⁹ *Harksen v Lane* 1998 1 SA 300 (CC) para 49.

⁴⁰ *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC) para 80. See also Albertyn & Goldblatt “Equality” in *CLOSA* 35–77.

⁴¹ *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 112.

The second and third leg of establishing unfairness is to consider the nature and purpose of the provision and the effect it has on the rights of the complainant. As discussed above and in Chapter 5, the Alteration Act has restrictions in place in respect of legal gender recognition for transgender children which then, in turn, promotes the vulnerabilities highlighted above. These unreasonable restrictions and experienced vulnerabilities impair transgender children's chances of gaining legal gender recognition, which could improve their life chances. In other words, if the transgender child's gender identity is legally recognised, the strenuous vulnerabilities will be minimised. It is submitted that this approach protects and promotes the transgender child's best interests in terms of physical and emotional security and also their intellectual, emotional, social development.

Since section 9 of the Constitution states that everyone is equal before the law and is entitled to equal treatment, refusing to legally recognise children solely based on their age and placing prerequisites in place such as medical procedures, amounts to an impairment of their fundamental human dignity, equality and freedom, in light of the treatment and recognition given to individuals who have undergone a medical transition which can also amount to unfair discrimination. The Alteration Act discriminates against them by placing limitations within the Act. Taking into consideration: (i) the vulnerable position of transgender children in society; (ii) the patterns of disadvantages and harms; (iii) the fact that the discrimination is on more than one listed ground; (iv) the effect of the legislative restraints on their best interests; and (v) the impairment of their human dignity, it is clear that transgender children are unfairly discriminated against by the Act based on their sex, gender and age.

After determining that the differentiation indeed constitutes unfair discrimination, the final step of the *Harksen* test is to establish whether any limitations would justify unfair discrimination. In terms of section 36, a law may only limit a right in the Bill of Rights if it is (a) a law of general application and if it is (b) reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. If the first leg is not met, it would not be necessary to continue the enquiry under the second leg.⁴²

A law of general application has two aspects: (i) for an Act to qualify it must have a character of law and (ii) the Act must not be unequal or arbitrary in its application.⁴³

⁴² Albertyn & Goldblatt "Equality" in *CLOSA* 35–76.

⁴³ Chapter 35, 76.

The Alteration Act does have a character of the law. Thus, in this sense, the first aspect is met. However, in terms of the second aspect, it is evident that the Alteration Act treats individuals unequally. The purpose of the Act is:

“To provide for the alteration of the sex description of certain individuals in certain circumstances ... and to provide for matters incidental thereto”.

The purpose of the Act stipulates the limitation of the Act. It states that it only provides for the alteration of sex descriptors for “certain individuals in certain circumstances”. These “certain” individuals are those who have, before applying for legal gender recognition, undergone a medical transition. The Alteration Act follows a medicalised approach that makes legal gender recognition only available to transgender individuals who have undergone a medical transition. The limitation in the Alteration Act excludes individuals who are unwilling or not able to undergo the prerequisite procedures in order to gain legal gender recognition, such as transgender children. Therefore, the Alteration Act fails to acknowledge a myriad of individuals who have valid reasons for not wanting to follow the procedure set out in the Act to change their assigned sex. These reasons include health concerns, financial limitations, religious beliefs, age, beliefs held regarding bodily integrity and human dignity, and privacy.⁴⁴

In the event that it is argued that the Alteration Act is not unequal or arbitrary in its application, this thesis submits that it is still evident that the Act is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as illustrated and analysed above. The limitation by the Alteration Act affects and contradicts the core values of the already highlighted fundamental rights of transgender children. The purpose of these limitations was not made clear during the public hearings of the Portfolio Committee of Home Affairs discussed in Chapter 5.⁴⁵ Reasons for the exclusion of children or the incorporation of a clear age limit for applications in the Act were, however, touched upon. The Lesbian and Gay Equality Project suggested that “there is no significant disadvantage of having to wait until eighteen” and according to “studies” and “research” “young people are not ready to make this decision”.⁴⁶ The sources that were referred to by the Lesbian and Gay

⁴⁴ Visser & Picarra (2012) SAHRJ 526.

⁴⁵ See heading 5 3 4.

⁴⁶ Portfolio Committee on Home Affairs “Alteration of Sex Description and Sex Status Bill: hearing” *Parliamentary Monitoring Group*.

Equality Project would have proven to be useful to this thesis if they had included it in their submission. Nevertheless, throughout this thesis it has been proven that more children are “coming out” at an early age and most children develop the ability to identify their own and other genders already between 18 and 24 months.⁴⁷ As stated in Chapter 2 of this thesis, children develop a clear understanding of their gender by the age of 2 or 3 and start to categorise different information regarding gender roles.⁴⁸ Arguing that children are too young to make decisions about their gender identity, illustrates “wait-and-see” tactics and further feeds into the fear that, if their gender identity is legally recognised, the child may more likely persist with a transgender identification, than if a so-called “neutral” or discouraging approach was to be followed.⁴⁹ Another perception exists that disaffirmation of gender identity has a protective function that shields children from transphobic discrimination, abuse and degradation.⁵⁰ There is currently no empirical research that demonstrates that by not allowing transgender children access to legal gender recognition reduces the frequency of persistence of their gender identity as they grow into adolescence and adulthood. According to Mallon and Descrescenzo, “no treatment program ..., no group therapy, no aversion treatment plan could change” transgender children.⁵¹ The act of disaffirming a child’s gender identity does not erase their identity, but it does, however, reduce the ease to which the child can live and function in the preferred gender identity.⁵² By not affirming the child’s gender identity legally, the child’s gender history could be exposed, which in actuality could increase the risk of subjecting the child to maltreatment, abuse and degradation in public.⁵³

This thesis theorises that the limitations within the Alteration Act are based on an outdated and incorrect understanding of gender, which is largely influenced by the conflation between gender and sex. The Act follows a medicalised approach with the

⁴⁷ Steensma et al (2013) *Horm Behav* 290. See also The World Professional Association for Transgender Health *Standards of Care for the Health of Transsexual, Transgender, and Gender Non-conforming People* 7th version *WPATH* 12. See heading 2.3.

⁴⁸ Atkinson & Russell (2015) *Australian Family Physician* 792–796.

⁴⁹ Dunne *The Conditions for Obtaining Legal Gender Recognition* 269. See also J Ristori & TD Steensma “Gender Dysphoria in Childhood” (2016) 28 *Int Rev Psychiatry* 13, 17. See further, Drescher (2013) *LGBT Health* 10, 13.

⁵⁰ Dunne *The Conditions for Obtaining Legal Gender Recognition* 269.

⁵¹ GP Mallon & T Descrescenzo “Social Work Practice with Transgender and Gender Variant Children and Youth” in GP Mallon (ed) *Social Work Practice with Transgender and Gender Variant Youth* 2 ed (1999) 73. See also Dunne *The Conditions for Obtaining Legal Gender Recognition* 269.

⁵² Dunne *The Conditions for Obtaining Legal Gender Recognition* 269.

⁵³ Sørli (2015) *Nordic Journal of Human Rights* 353 369. See also Dunne *The Conditions for Obtaining Legal Gender Recognition* 269.

preconceived notion that all transgender individuals would appreciate and be able to afford a medical transition. It is true that this is the reality for some transgender individuals, however, it might not be the reality for all. The costs associated with undergoing a medical transition could be burdensome to certain individuals. Interestingly, the majority of South African medical aid schemes “do not cover what they consider to be ‘lifestyle choices’ that necessitates ‘elective procedures’ or treatments”.⁵⁴ Therefore, the Alteration Act fails to foresee that it excludes individuals based on their financial abilities to succeed in the application procedure prescribed by the Act. Furthermore, the Act fails to foresee that it excludes vulnerable children from having their gender legally recognised by infringing on their rights in terms of the Constitution and international law.

To reiterate, transgender children are vulnerable and susceptible to marginalisation, discrimination, bullying, abuse, maltreatment, and degradation. As already submitted above and in prior chapters, if transgender children are able to gain legal gender recognition, it can ultimately lead to a minimisation of their vulnerabilities and susceptibilities to harm. The limitation placed on legal gender recognition without a medical transition, could arguably be permanent for individuals who do not want to or cannot afford to undergo a medical transition in order to live legally in their innate gender identity. The limitation affects not only transgender children, but also a vast majority of the transgender community as a whole, while also placing a more significant limitation on the right to self-determination, which leads to a complete denial of the enjoyment of the Alteration Act. Therefore, it is further submitted that the Act follows an unreasonable restricted and narrow approach to achieve its sole purpose of recognising the right to gender identity, which is not reasonably justifiable in an open and democratic society based on the rights of human dignity, equality and freedom for all.

6 4 Conclusion

This chapter illustrated the extent to which the South African legal framework fails to give effect to the State’s international duties, as established throughout this thesis. In analysing the duty of the State in relation to transgender children in terms of the

⁵⁴ Carrie “Healthcare, medical aid, and the transgender struggle in South Africa” (28-10-2018) www.2oceansvibe.com <<https://www.2oceansvibe.com/2018/10/26/healthcare-medical-aid-and-the-transgender-struggle-in-south-africa/>> (accessed 27-08-2019).

Constitution and international law, it is evident that there is a duty to respect and promote the rights of transgender children.

The first question this chapter approached, was to determine if there is a right to legal gender recognition for children. It was established that children do have a right to have their gender identity recognised in terms of their rights to human dignity, equality and freedom, as well as due to the fact that the acknowledgement of their gender identity is in their best interests. By looking through the same lens of the abovementioned rights, it was established that transgender children's right to access legal gender recognition should be acknowledged and enforced in terms of the law, considering: (i) their right to equality and to not be discriminated against; (ii) respecting their human dignity – promoting the heavily emphasised duty on the State to ensure the child's right to development and their duty to eliminate social and cultural practices affecting the child's welfare, human dignity, growth and development and further due to the fact that allowing children access to legal gender recognition would enable them to grow up in an environment and atmosphere of happiness, love and understanding; and finally (iii) the fact that it provides the child the opportunity to participate by exercising their right to autonomy, while fostering their self-determination capabilities and safeguarding their bodily autonomy.

Secondly, this chapter showed that the Alteration Act is unconstitutional since it unfairly discriminates against transgender children based on the grounds of their sex, gender and age. As previously mentioned, the purpose of the Alteration Act is to "provide for the alteration of the sex description" while its limitation is to only provide this for "certain individuals in certain circumstances". It is submitted, that in a constitutional system based on equality, human dignity and freedom, there should be no restrictions or limitations on an individual's innate identity. Human beings are born free and equal in dignity. Everyone should be able to exercise their right to freedom of choice in determining their innate gender identity. Everyone should be able to decide what they would want or not want to do with their bodies. Subjecting people to a medical approach is an old and outdated approach in the context of developing rights. The Alteration Act should not uphold limitations that are harmful, and that makes transgender children more vulnerable. In terms of section 36 of the South African Constitution, a limitation will not be proportionate if other less restrictive means could achieve the same ends. These other means should not restrict rights at all, or they should not be restrictive to the same extent. Throughout the analysis above, the

discussion touched upon certain less restrictive means through which the process of access to legal gender recognition could be made quick, transparent and accessible.

The final chapter of this thesis will set out the recommendations provided throughout this thesis as to how the South African legislative framework could implement their established duty, in order to provide practical measures for protecting and promoting the rights of transgender children to legal gender recognition, in terms of a more constitutional approach.

CHAPTER 7: CONCLUSION

7 1 Introduction

The central question that this thesis set out to answer was whether the right to legal gender recognition is accessible to transgender children in South Africa. To answer this question, it was necessary to first establish if such a right exists. Subsequently, after this thesis determined that transgender children do have a right to legal gender recognition, it needed to be established to what extent this right is recognised and applied in South Africa.

Chapter 2 of this thesis provided an outline of the study of gender development and examined the current understanding of the terms gender, gender identity, and gender development regarding children and their identity. The chapter defined several relevant medical, psychological, and social terms and definitions, while also exploring the theoretical perspectives that organise the field. Chapter 3 discussed the concept of child law and highlighted the theories of children's rights relevant to the study. Further, the rights of transgender children and the duties of Member States have been described in Chapter 3, as they are established in terms of the international treaties such as the UNCRC and the ACRWC.¹ In order to add persuasive value to establishing a right to gender identity, this chapter observed the adopted interpretations from the Inter-American –, and European systems. In the same chapter, the Yogyakarta Principles were analysed and the application of the Principles in relation to transgender children was determined.² Chapter 3 established that transgender children do enjoy protection under international law, including the right to have their gender identity legally recognised. Furthermore, Chapter 4 investigated the application of this right in foreign jurisdictions, such as Argentina, Malta and Ireland.³ The practices of these jurisdictions provided a useful framework to gauge possible best practices in realising the right of transgender children to legal gender recognition. It was emphasised that best practices include having quick, accessible, and transparent mechanisms in place for legal gender recognition based on the self-declaration model.

¹ See heading 3 4.

² See heading 3 5.

³ See heading 4 3 and 4 4.

Chapter 5 laid out the South African legal framework by determining the current implementation of the rights of transgender children in South Africa.⁴ The aim of Chapter 5 was to examine the underlying assumptions of this thesis, which hypothesised that there is a duty on South Africa to make legal gender recognition available to all, without having medical and age preconditions in place. Chapter 5 identified particular rights guaranteed in the Constitution and within the South African legislative framework, such as the PEPUDA and the Children's Act, that indeed provide for a right to legal gender recognition for transgender children.

To reiterate, section 39 of the Constitution states that the international law should be considered when interpreting the Bill of Rights, while section 233 states that a reasonable interpretation of legislation must be consistent with international law. Chapter 6 confirmed the underlying assumptions of this thesis: the South African implementation of the rights of transgender children fails to accord to obligated international standards. Further, in terms of section 36 (the limitations clause) of the South African Constitution, this thesis found that the limitation of the Alteration Act cannot be regarded as a law of general application due to its unequal application. Further, the Alteration Act can also not be reasonably justifiable in an open and democratic society based on human dignity, equality, and freedom, which renders the Alteration Act unconstitutional. The argument presented was that the Act is drafted too narrowly resulting in it not giving effect to its purpose, which is to make gender recognition accessible, while also not being consistent with international law. Consequently, Chapter 6 established that legal reform is required. In this final Chapter, this thesis will address how the process of access to legal gender recognition for transgender children should be construed and implemented in the South African legal framework. To this end, this Chapter draws upon the preceding analysis and critiques in offering recommendations for the South African legal framework.

7 2 Recommendations

It is evident from the analysis in this thesis that South Africa has a duty in terms of the Constitution and international law to acknowledge a right to legal gender recognition for transgender children in its legal framework. Acknowledging the right to legal gender

⁴ See heading 5 2 for a discussion on the Constitutional rights of transgender children. See further heading 5 3 for a discussion on the applicable legislation.

recognition will then also translate to the enforcement thereof, which, in turn, will give further effect to the rights of transgender children to human dignity, equality, and freedom as illustrated throughout this thesis. This thesis will now turn to establish how the South African legal framework, pertaining the right of transgender children to legal gender recognition, can be developed and implemented.

As a point of departure, the Yogyakarta Principles should be considered. South Africa has embraced the Yogyakarta Principles, which is evident from the reference to these principles by courts and governmental bodies.⁵ The general obligations on Member States highlighted in the Yogyakarta Principles are to respect, protect, and promote human rights, regardless of SOGIESC, while also enhancing accountability mechanisms for perpetrators who violate such rights.⁶ To reiterate, the Yogyakarta Principles encapsulate and represent an authoritative interpretation of the international legal framework in relation to the enforcement of rights pertaining to SOGIESC. It defines SOGIESC as an integral part of an individual's dignity and humanity, and that it should not be regarded as a basis for discrimination or abuse.⁷ The Principles, although not binding, should be taken into consideration when cogitating a legal framework for the protection and promotion of SOGIESC rights. Using the Yogyakarta Principles to initiate legal reform is not new. The Principles have been used by Argentina, Malta and recently in the Supreme Court of India and the High Court of South Africa.⁸ Therefore, it is recommended that when legislation regarding SOGIESC is envisioned, the Yogyakarta Principles should be consulted as a point of guidance.

Considering this recommendation, and in giving effect to a required transparent legislative framework, definitions should be provided for *gender* which should encompass both the internal and external aspects thereof. The PEPUA currently defines gender in section 8. However, as discussed in Chapter 5, this definition only illustrates an external understanding of gender, wherein it prohibits unfair discrimination based on the gender roles of women.⁹ In an attempt to avoid conflation between sex and gender, legislation should regulate the definition of gender to include the internal aspects thereof, that is, gender identity. The definition of gender identity

⁵ See 3 5 4.

⁶ M O'Flaherty & J Fisher "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles" (2008) 8 *Human Rights Law Review* 207–248.

⁷ See Annexure A of this thesis.

⁸ See heading 3 5 4.

⁹ See heading 5 3 2.

in the Yogyakarta Principles could provide possible guidance in incorporating the term *gender identity*, as it was done in the Gender Identity Law and GIGESC Act.¹⁰ It is therefore recommended that the definitions of the Alteration Act be revised to avoid a conflated understanding of the terms *gender* and *sex*. The envisioned definition proposed by this thesis for gender identity within the South African legislative framework should read as follows:

“Gender identity is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms”.¹¹

The Yogyakarta Principles, furthermore, illustrates the best practices envisioned for promoting and protecting the right to legal gender recognition. Principle 31 provides that everyone has a right to legal gender recognition. This right should be realised with the understanding that everyone has the right to obtain identity documents, such as birth certificates, identification cards and passports, which should be provided regardless of a person’s SOGIESC. If South Africa is to ensure to the highest degree possible the child’s best interests and rights to autonomy, development, identity and non-discrimination, as well as follow the guidance under Principle 31, South Africa has a duty to ensure that no eligibility criteria, such as medical or psychological interventions, minimum age, or any third-party opinion shall be a prerequisite to change one’s name or gender.¹² The current South African legal framework provides conditional access to legal gender recognition through the Alteration Act.¹³

Chapter 6 determined that the Alteration Act unfairly discriminates against individuals who do not want to follow the set-out requirements of the Act, and that it also excludes children from accessing legal gender recognition based on preconditions such as age and gender. In establishing the constitutionality of the Alteration Act, it was submitted that the Act is unconstitutional in that it follows an unreasonably restricted and narrow approach to achieve its sole purpose, which is to

¹⁰ Article 2 of the GIGESC Act. See also Article 2 of the Gender Identity Law. See headings 4 3 and 4 4 1.

¹¹ Introduction to the Yogyakarta Principles. See Annexure A of this thesis.

¹² Principle 31. See Annexure A of this thesis.

¹³ See heading 5 3 4.

recognise the right to gender identity. This approach is not reasonable and justifiable in an open and democratic society based on the right of human dignity, equality and freedom for all.

In Chapter 6, it was further found that the Alteration Act further fails to give effect to sections 9(3) of the Constitution, Article 2 of the UNCRC and Article 3 of the ACRWC that prohibits unfair discrimination based on gender and age. The right to equality entails the promotion of inclusion. To reiterate, if equality means that everyone should have equal enjoyment of all rights and freedoms, then there should not be any eligibility criteria such as medical or psychological interventions and minimum age requirements as prerequisites to access equal protection and benefit of the law. This is particularly important where the recognition of an individual's identity, which is one of the most fundamental aspects of what it means to be human, is concerned.

In terms of the right to human dignity, the Alteration Act fails to ensure the human dignity of all individuals. The duty to protect and promote the dignity of every individual, regardless of their age and gender, is a duty of the State in terms of the Constitution and international law.¹⁴ In addition to the right to human dignity, the right to freedom has a comprehensive meaning. It contains the ability to make self-determined and independent choices.¹⁵ Respecting everyone's human dignity and freedom consists of the recognition that every person is able to make their own choices. It is only through the recognition and application of the self-declaration model, that this aspect can be realised for transgender children in terms of recognising their gender identity.¹⁶

The Yogyakarta Principles states in Principle 2 that each person should have the right to self-determination. This right stems from the fact that gender identity is integral to a person's personality, and in realising the right to gender identity, no person shall be forced to undergo medical or surgical procedures as a requirement for legal gender recognition. The Yogyakarta Principles strongly advocates for the self-declaration model. The Parliamentary Assembly of the Council of Europe and the Inter-American Court of Human Rights have called upon Member States to recognise gender identity legally, irrespective of age and medical status, and these procedures should be quick, transparent and accessible. Many foreign States recognises the self-declaration

¹⁴ See section 10 of the Constitution. See further heading 3 4 4.

¹⁵ De Wet & Van Vollenhoven (2015) *International Journal of Education Law and Policy* 8.

¹⁶ Currie & De Waal *The Bill of Rights Handbook* 253.

model.¹⁷ Argentina and Malta were the first states to legally recognise the right to gender identity for children. Both acts do not have any medical prerequisites in place for accessing legal gender recognition.

There is a sharp contrast between the Gender Identity Law and GIGESC Act, and the Alteration Act. The Gender Identity law and GIGESC Act follow the self-declaration model, which gives effect to fundamental rights such as the right to equality, human dignity, gender identity, autonomy, to participate and to be heard, freedom of choice, freedom of bodily integrity and the best interests of the child. The Alteration Act juxtaposes the self-declaration model by utilising a medicalised approach. The Alteration Act follows a combination of the treatment model and the assessment model. It is clear that the modern notion is to shift away from these two models as affirmed by the ECtHR and the Inter-American Court of Human Rights, due to the fact that these models are at odds with the best practices embodied in the UNCRC, ACRWC, the Yogyakarta Principles and the WPATH. The approach taken by Argentina and Malta not only gives effect to the self-declaration model, but further accords to the literature on transgender identities as explored in Chapter 2 of this thesis. There it was highlighted that gender identity is formed at an early stage in a child's development.¹⁸ Thus, if gender identity is fixed at a young age, there should not be unnecessary prerequisites for accessing legal gender recognition.¹⁹ Taking the abovementioned into consideration, this thesis identified that the self-declaration model could be a potential avenue for providing transgender children access to legal gender recognition. This approach would best promote, protect and respect their fundamental human rights, while being in their best interests.

To reiterate, the Alteration Act does not expressly mention an age requirement, but reading the Alteration Act in conjunction with section 129 of the Children's Act and the WPATH, it is clear that upon reaching the age of 12, pubescent children can start stage 1 treatment. Stage 1 treatment would meet the application requirements as set out in section 2 of the Alteration Act.²⁰ Thus, in order for a child to have their gender identity legally recognised, they have to reach the age of 12 and undergo medical treatment. As previously noted in Chapter 3, there is a duty on the State to respect,

¹⁷ See heading 4 2 2.

¹⁸ See heading 2 3.

¹⁹ Gray *A critique of the legal recognition of transsexuals in UK law* 212.

²⁰ See headings 5 3 3 and 5 3 4.

protect and promote the gender identity of all children irrespective of their age.²¹ The international law and the Yogyakarta Principles requires Member States to ensure access to legal gender recognition for all, without preconditions such as medical transitioning and reaching a particular age. Therefore, there is a well-established duty on South Africa to provide legal gender recognition to all. The question arises as to how this right to legal gender recognition based on self-declaration can be realised.

As mentioned above, it is recommended that the guidance set out by the Yogyakarta Principles should be followed. In terms of Principle 31, South Africa should ensure access to a quick, transparent, and accessible mechanism to alter gendered information on official documents. These mechanisms should allow for the recognition of the individual's self-defined gender identity, while also ensuring that no eligibility criteria, such as medical or psychological interventions, minimum age and any third-party opinion shall be prerequisites to change one's gender information. Acknowledging a person's self-defined gender identity requires moving away from the treatment and assessment model, which is the current position in terms of the Alteration Act, towards the self-declaration model. It is therefore recommended that the Department of Home Affairs should have a quick, accessible, and transparent mechanism in place for individuals to access legal gender recognition. Quick and accessible mechanisms can be achieved by allowing applicants to alter their gender identity by simply completing a form that requests the Department to change their gender. Transparency would stem from a clear legislative framework that is general in its application and acknowledges the right to legal gender recognition for all.

Although the process of accessing legal gender recognition should be available to all transgender children regardless of their age, the difficulty of providing a quick, accessible, and transparent mechanism comes with the practical implementation thereof. Questions that could arise are: (i) how this right should be realised for young children with a limited capacity to act; and (ii) what about parental responsibilities and rights.

The importance of granting children access to legal gender recognition has been emphasised throughout this thesis. As a guiding principle, the best interests of the child should be a primary consideration in realising the right to legal gender recognition. In line with international law, the Constitution and the Children's Act, this thesis has

²¹ See headings 3 4 4 and 3 4 5.

established that when considering the best interests of the child principle, it will always be in the best interests of the transgender child to have their gender identity legally recognised. However, the difficulty lies in determining the application scope of the right to legal gender recognition. As mentioned above, Eekelaar proposes that parents take an imaginative leap where the child's basic, developmental, and autonomy interests should be evaluated when considering what would be in the child's best interests.²² In evaluating their basic, development and autonomy interests this thesis found that by merely taking the transgender child's basic and developmental interests into account, it is clear that granting transgender children access to legal gender recognition would be in their best interests, while also promoting and protecting their rights to human dignity, equality, and freedom. However, this argument is in no way advocating that the child should not be listened to – before investigating the transgender child's basic and developmental interests, it will almost always start with the child asserting their autonomy, either through words or actions, which would give effect to the self-declaration model. Thus, the duty to make legal gender recognition procedures available to all children, regardless of their age, proves to be crucial.

In light of the conceivable questions identified above, a potential avenue to consider would be to allow a child, who is over the age of 12 years, to apply to alter their gender legally in their own capacity, either through medical transitioning or social transitioning. However, the child should have the mental capacity to understand the benefits and social implications of having their gender legally altered. This proposal draws from section 129 of the Children's Act that allows a child to consent to their own medical treatment or surgeries upon meeting certain criteria. Therefore, although children can already access legal gender recognition procedures at the age of 12 (by undergoing a medical transition), this approach gives effect to the self-declaration model while also moving away from a restricted medicalised approach.

Inspired by the Gender Identity Law and the Review Report of the Irish Gender Recognition Act, a proposal to regulate legal gender recognition procedures for children under the age of 12 would be to permit an application to be made on behalf of the child by a person that holds parental responsibilities and rights.²³ Section 31 of the Children's Act states that, before a parent makes any important decisions involving

²² See heading 3 3 3.

²³ See headings 4 3 and 4 4 2.

the child, due consideration must be given to the views and wishes of the child, while bearing the child's age, maturity, and stage of development in mind. Subsection (b) clarifies in subsubsection (iv) that an important decision is one that is "likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being". This thesis considers acquiring legal gender recognition as an important decision in terms of section 31 of the Children's Act. Therefore, after having due consideration of the child's views and wishes as well as the child's best interests, parents should be able to apply for legal gender recognition on the child's behalf. A further possibility under this proposal would be to require all persons that hold parental responsibilities and rights in respect of the child to make a statutory declaration to the Director-General of Home Affairs, granting parental consent. This statutory declaration should reflect a child-centred approach that would include the voice, capacity, and the best interests of the child. Similar to Argentina's and Norway's positions, should one or both parents refuse, the Children's Court could be approached for relief.²⁴ The court should then make a decision based on an assessment of the best interests of the child. This thesis submits that to evaluate the best interests of the transgender child, the child's gender, the physical and emotional security, their intellectual, emotional, social and cultural development, and the need to protect the child from any physical or psychological harm need to be taken into consideration. Having the proposed clarity within the legal framework would greatly assist courts in this regard.

Thus, in light of establishing the right to legal gender recognition, the Alteration Act needs to be amended. It is recommended that provisions to realise this right to all children should be promulgated in terms of the Alteration Act. Considering all of the above points, the envisioned amendment of the Alteration Act should have the purpose of providing for the alteration of gender markers based on self-determination that may involve, if freely chosen, modification of sexual characteristics. Everyone should therefore be able to have their gender identity recognised and be treated according to their gender identity and, particularly, be identified in that way in official identification documents.

²⁴ See headings 4 3, 4 4 and 4 2 2.

7 3 Concluding remarks

The South African Constitution is transformative in nature. Its foundation is to protect and promote human dignity, achieve equality, and advance human rights and freedoms for all. In terms of international law, there is a well-established duty on South Africa to respect, protect, and promote the right to gender identity. It is against this background that the right to legal gender recognition should be implemented. If everyone is to be free in human dignity and equality, then a restricted approach should not be followed where the recognition of one's identity is concerned. The denial of legal gender recognition due to prerequisites such as medical treatments and procedures, is not only outdated, as seen from the recent trends under the European- and Inter-American systems, but it is also unconstitutional. Denying a child their gender identity is equal to denying another child the right to a name. Both rights are the same in that both give effect and forms an individual's core identity.

This thesis established that the current South African legal framework infringes on the rights of transgender children by not affording them access to legal gender recognition based on self-determination. Providing children with access to have their gender identity legally recognised, is to acknowledge their existence as human rights holders in terms of the Constitution and international law.

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THE YOGYAKARTA PRINCIPLES

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INTERNATIONAL HUMAN RIGHTS LAW
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Principles on the application of international human rights law
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INTRODUCTION TO THE YOGYAKARTA PRINCIPLES

All human beings are born free and equal in dignity and rights. All human rights are universal, interdependent, indivisible and interrelated. Sexual orientation¹⁾ and gender identity²⁾ are integral to every person's dignity and humanity and must not be the basis for discrimination or abuse.

Many advances have been made toward ensuring that people of all sexual orientations and gender identities can live with the equal dignity and respect to which all persons are entitled. Many States now have laws and constitutions that guarantee the rights of equality and non-discrimination without distinction on the basis of sex, sexual orientation or gender identity.

Nevertheless, human rights violations targeted toward persons because of their actual or perceived sexual orientation or gender identity constitute a global and entrenched pattern of serious concern. They include extra-judicial killings, torture and ill-treatment, sexual assault and rape, invasions of privacy, arbitrary detention, denial of employment and education opportunities, and serious discrimination in relation to the enjoyment of other human rights. These violations are often compounded by experiences of other forms of violence, hatred, discrimination and exclusion, such as those based on race, age, religion, disability, or economic, social or other status.

Many States and societies impose gender and sexual orientation norms on individuals through custom, law and violence and seek to control how they experience personal relationships and how they identify themselves. The policing of sexuality remains a major force behind continuing gender-based violence and gender inequality.

The international system has seen great strides toward gender equality and protections against violence in society, community and in the family. In addition, key human rights mechanisms of the United Nations have affirmed States' obligation to ensure effective protection of all persons from discrimination based on sexual orientation or gender identity. However, the international response to human rights violations based on sexual orientation and gender identity has been fragmented and inconsistent.

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- 1) Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.
 - 2) Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

To address these deficiencies a consistent understanding of the comprehensive regime of international human rights law and its application to issues of sexual orientation and gender identity is necessary. It is critical to collate and clarify State obligations under existing international human rights law, in order to promote and protect all human rights for all persons on the basis of equality and without discrimination.

The International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organisations, have undertaken a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity to bring greater clarity and coherence to States' human rights obligations.

A distinguished group of human rights experts has drafted, developed, discussed and refined these Principles. Following an experts' meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 November 2006, 29 distinguished experts from 25 countries with diverse backgrounds and expertise relevant to issues of human rights law unanimously adopted the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*.

The rapporteur of the meeting, Professor Michael O'Flaherty, has made immense contributions to the drafting and revision of the Principles. His commitment and tireless efforts have been critical to the successful outcome of the process.

The Yogyakarta Principles address a broad range of human rights standards and their application to issues of sexual orientation and gender identity. The Principles affirm the primary obligation of States to implement human rights. Each Principle is accompanied by detailed recommendations to States. The experts also emphasise, though, that all actors have responsibilities to promote and protect human rights. Additional recommendations are addressed to other actors, including the UN human rights system, national human rights institutions, the media, non-governmental organisations, and funders.

The experts agree that the Yogyakarta Principles reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity. They also recognise that States may incur additional obligations as human rights law continues to evolve.

The Yogyakarta Principles affirm binding international legal standards with which all States must comply. They promise a different future where all people born free and equal in dignity and rights can fulfil that precious birthright.

Sonia Onufer Corrêa
Co-Chairperson

Vitit Muntarbhorn
Co-Chairperson

WE, THE INTERNATIONAL PANEL OF EXPERTS IN INTERNATIONAL HUMAN RIGHTS LAW AND ON SEXUAL ORIENTATION AND GENDER IDENTITY

PREAMBLE

RECALLING that all human beings are born free and equal in dignity and rights, and that everyone is entitled to the enjoyment of human rights without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;

DISTURBED that violence, harassment, discrimination, exclusion, stigmatisation and prejudice are directed against persons in all regions of the world because of their sexual orientation or gender identity, that these experiences are compounded by discrimination on grounds including gender, race, age, religion, disability, health and economic status, and that such violence, harassment, discrimination, exclusion, stigmatisation and prejudice undermine the integrity and dignity of those subjected to these abuses, may weaken their sense of self-worth and belonging to their community, and lead many to conceal or suppress their identity and to live lives of fear and invisibility;

AWARE that historically people have experienced these human rights violations because they are or are perceived to be lesbian, gay or bisexual, because of their consensual sexual conduct with persons of the same gender or because they are or are perceived to be transsexual, transgender or intersex or belong to social groups identified in particular societies by sexual orientation or gender identity;

UNDERSTANDING ‘sexual orientation’ to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender;

UNDERSTANDING ‘gender identity’ to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms;

OBSERVING that international human rights law affirms that all persons, regardless of sexual orientation or gender identity, are entitled to the full enjoyment of all human rights, that the application of existing human rights entitlements should take account of the specific situations and experiences of people of diverse sexual orientations and gender identities, and that in all actions concerning children the best interests of the child shall be a primary consideration and a child who is capable of forming personal views has the right to express those views freely, such views being given due weight in accordance with the age and maturity of the child;

NOTING that international human rights law imposes an absolute prohibition of discrimination in regard to the full enjoyment of all human rights, civil, cultural, economic, political and social, that respect for sexual rights, sexual orientation and gender identity is integral to the realisation of equality between men and women and that States must take measures to seek to eliminate prejudices and customs based on the idea of the inferiority or the superiority of one sex or on stereotyped roles for men and women, and noting further that the international community has recognised the right of persons to decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free from coercion, discrimination, and violence;

RECOGNISING that there is significant value in articulating in a systematic manner international human rights law as applicable to the lives and experiences of persons of diverse sexual orientations and gender identities;

ACKNOWLEDGING that this articulation must rely on the current state of international human rights law and will require revision on a regular basis in order to take account of developments in that law and its application to the particular lives and experiences of persons of diverse sexual orientations and gender identities over time and in diverse regions and countries.

**FOLLOWING AN EXPERTS' MEETING
HELD IN YOGYAKARTA, INDONESIA,
FROM 6 TO 9 NOVEMBER 2006,
HEREBY ADOPT THESE PRINCIPLES:**

PRINCIPLE

1 THE RIGHT TO THE UNIVERSAL ENJOYMENT OF HUMAN RIGHTS

All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.

STATES SHALL:

- A.** Embody the principles of the universality, interrelatedness, interdependence and indivisibility of all human rights in their national constitutions or other appropriate legislation and ensure the practical realisation of the universal enjoyment of all human rights;
- B.** Amend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of all human rights;
- C.** Undertake programmes of education and awareness to promote and enhance the full enjoyment of all human rights by all persons, irrespective of sexual orientation or gender identity;
- D.** Integrate within State policy and decision-making a pluralistic approach that recognises and affirms the interrelatedness and indivisibility of all aspects of human identity including sexual orientation and gender identity.

PRINCIPLE

2 THE RIGHTS TO EQUALITY AND NON-DISCRIMINATION

Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.

Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition,

enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.

STATES SHALL:

- A.** Embody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation, if not yet incorporated therein, including by means of amendment and interpretation, and ensure the effective realisation of these principles;
- B.** Repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;
- C.** Adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity;
- D.** Take appropriate measures to secure adequate advancement of persons of diverse sexual orientations and gender identities as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights. Such measures shall not be deemed to be discriminatory;
- E.** In all their responses to discrimination on the basis of sexual orientation or gender identity, take account of the manner in which such discrimination may intersect with other forms of discrimination;
- F.** Take all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.

THE RIGHT TO RECOGNITION BEFORE THE LAW

PRINCIPLE
3

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation

or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

STATES SHALL:

- A.** Ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;
- B.** Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;
- C.** Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person's profound self-defined gender identity;
- D.** Ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;
- E.** Ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy;
- F.** Undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.

PRINCIPLE

4 THE RIGHT TO LIFE

Everyone has the right to life. No one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity. The death penalty shall not be imposed on any person on the basis of consensual sexual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity.

STATES SHALL:

- A.** Repeal all forms of crime that have the purpose or effect of prohibiting consensual sexual activity among persons of the same sex who are over the age of consent and, until such provisions are repealed, never impose the death penalty on any person convicted under them;
- B.** Remit sentences of death and release all those currently awaiting execution for crimes relating to consensual sexual activity among persons who are over the age of consent;
- C.** Cease any State-sponsored or State-condoned attacks on the lives of persons based on sexual orientation or gender identity, and ensure that all such attacks, whether by government officials or by any individual or group, are vigorously investigated, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished.

THE RIGHT TO SECURITY OF THE PERSON

PRINCIPLE
5

Everyone, regardless of sexual orientation or gender identity, has the right to security of the person and to protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual or group.

STATES SHALL:

- A.** Take all necessary policing and other measures to prevent and provide protection from all forms of violence and harassment related to sexual orientation and gender identity;
- B.** Take all necessary legislative measures to impose appropriate criminal penalties for violence, threats of violence, incitement to violence and related harassment, based on the sexual orientation or gender identity of any person or group of persons, in all spheres of life, including the family;
- C.** Take all necessary legislative, administrative and other measures to ensure that the sexual orientation or gender identity of the victim may not be advanced to justify, excuse or mitigate such violence;
- D.** Ensure that perpetration of such violence is vigorously investigated, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished, and that victims are provided with appropriate remedies and redress, including compensation;
- E.** Undertake campaigns of awareness-raising, directed to the general public as well as to actual and potential perpetrators of violence, in order to combat the prejudices that underlie violence related to sexual orientation and gender identity.

PRINCIPLE

6 THE RIGHT TO PRIVACY

Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure the right of each person, regardless of sexual orientation or gender identity, to enjoy the private sphere, intimate decisions, and human relations, including consensual sexual activity among persons who are over the age of consent, without arbitrary interference;
- B. Repeal all laws that criminalise consensual sexual activity among persons of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;
- C. Ensure that criminal and other legal provisions of general application are not applied to *de facto* criminalise consensual sexual activity among persons of the same sex who are over the age of consent;
- D. Repeal any law that prohibits or criminalises the expression of gender identity, including through dress, speech or mannerisms, or that denies to individuals the opportunity to change their bodies as a means of expressing their gender identity;
- E. Release all those held on remand or on the basis of a criminal conviction, if their detention is related to consensual sexual activity among persons who are over the age of consent, or is related to gender identity;
- F. Ensure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and protect all persons from arbitrary or unwanted disclosure, or threat of disclosure of such information by others.

THE RIGHT TO FREEDOM FROM ARBITRARY DEPRIVATION OF LIBERTY **7**

No one shall be subjected to arbitrary arrest or detention. Arrest or detention on the basis of sexual orientation or gender identity, whether pursuant to a court order or otherwise, is arbitrary. All persons under arrest, regardless of their sexual orientation or gender identity, are entitled, on the basis of equality, to be informed of the reasons for arrest and the nature of any charges against them, to be brought promptly before a judicial officer and to bring court proceedings to determine the lawfulness of detention, whether or not charged with any offence.

STATES SHALL:

- A.** Take all necessary legislative, administrative and other measures to ensure that sexual orientation or gender identity may under no circumstances be the basis for arrest or detention, including the elimination of vaguely worded criminal law provisions that invite discriminatory application or otherwise provide scope for arrests based on prejudice;
- B.** Take all necessary legislative, administrative and other measures to ensure that all persons under arrest, regardless of their sexual orientation or gender identity, are entitled, on the basis of equality, to be informed of the reasons for arrest and the nature of any charges against them, and whether charged or not, to be brought promptly before a judicial officer and to bring court proceedings to determine the lawfulness of detention;
- C.** Undertake programmes of training and awareness-raising to educate police and other law enforcement personnel regarding the arbitrariness of arrest and detention based on a person's sexual orientation or gender identity;
- D.** Maintain accurate and up to date records of all arrests and detentions, indicating the date, location and reason for detention, and ensure independent oversight of all places of detention by bodies that are adequately mandated and equipped to identify arrests and detentions that may be motivated by the sexual orientation or gender identity of a person.

THE RIGHT TO A FAIR TRIAL **8**

Everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law, in the determination of their rights and obligations in a suit at law and of any criminal charge against them, without prejudice or discrimination on the basis of sexual orientation or gender identity.

STATES SHALL:

- A.** Take all necessary legislative, administrative and other measures to prohibit and eliminate prejudicial treatment on the basis of sexual orientation or gender identity at every stage of the judicial process, in civil and criminal proceedings and all other judicial and administrative proceedings which determine rights and obligations, and to ensure that no one's credibility or character as a party, witness, advocate or decision-maker is impugned by reason of their sexual orientation or gender identity;
- B.** Take all necessary and reasonable steps to protect persons from criminal prosecutions or civil proceedings that are motivated wholly or in part by prejudice regarding sexual orientation or gender identity;
- C.** Undertake programmes of training and awareness-raising for judges, court personnel, prosecutors, lawyers and others regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity.

PRINCIPLE

9 THE RIGHT TO TREATMENT WITH HUMANITY WHILE IN DETENTION

Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person's dignity.

STATES SHALL:

- A.** Ensure that placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse;
- B.** Provide adequate access to medical care and counselling appropriate to the needs of those in custody, recognising any particular needs of persons on the basis of their sexual orientation or gender identity, including with regard to reproductive health, access to HIV/AIDS information and therapy and access to hormonal or other therapy as well as to gender-reassignment treatments where desired;
- C.** Ensure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity;
- D.** Put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population;

- E.** Ensure that conjugal visits, where permitted, are granted on an equal basis to all prisoners and detainees, regardless of the gender of their partner;
- F.** Provide for the independent monitoring of detention facilities by the State as well as by non-governmental organisations including organisations working in the spheres of sexual orientation and gender identity;
- G.** Undertake programmes of training and awareness-raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity.

THE RIGHT TO FREEDOM FROM TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

PRINCIPLE 10

Everyone has the right to be free from torture and from cruel, inhuman or degrading treatment or punishment, including for reasons relating to sexual orientation or gender identity.

STATES SHALL:

- A.** Take all necessary legislative, administrative and other measures to prevent and provide protection from torture and cruel, inhuman or degrading treatment or punishment, perpetrated for reasons relating to the sexual orientation or gender identity of the victim, as well as the incitement of such acts;
- B.** Take all reasonable steps to identify victims of torture and cruel, inhuman or degrading treatment or punishment, perpetrated for reasons relating to sexual orientation or gender identity, and offer appropriate remedies including redress and reparation and, where appropriate, medical and psychological support;
- C.** Undertake programmes of training and awareness-raising for police, prison personnel and all other officials in the public and private sector who are in a position to perpetrate or to prevent such acts.

PRINCIPLE

11 THE RIGHT TO PROTECTION FROM ALL FORMS OF EXPLOITATION, SALE AND TRAFFICKING OF HUMAN BEINGS

Everyone is entitled to protection from trafficking, sale and all forms of exploitation, including but not limited to sexual exploitation, on the grounds of actual or perceived sexual orientation or gender identity. Measures designed to prevent trafficking shall address the factors that increase vulnerability, including various forms of inequality and discrimination on the grounds of actual or perceived sexual orientation or gender identity, or the expression of these or other identities. Such measures must not be inconsistent with the human rights of persons at risk of being trafficked.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures of a preventive and protective nature regarding the trafficking, sale and all forms of exploitation of human beings, including but not limited to sexual exploitation, on the grounds of actual or perceived sexual orientation or gender identity;
- B. Ensure that any such legislation or measures do not criminalise the behaviour of, stigmatise, or in any other way, exacerbate the disadvantage of those vulnerable to such practices;
- C. Establish legal, educational and social measures, services and programmes to address factors that increase vulnerability to trafficking, sale and all forms of exploitation, including but not limited to sexual exploitation, on the grounds of actual or perceived sexual orientation or gender identity, including such factors as social exclusion, discrimination, rejection by families or cultural communities, lack of financial independence, homelessness, discriminatory social attitudes leading to low self-esteem, and lack of protection from discrimination in access to housing, accommodation, employment and social services.

PRINCIPLE

12 THE RIGHT TO WORK

Everyone has the right to decent and productive work, to just and favourable conditions of work and to protection against unemployment, without discrimination on the basis of sexual orientation or gender identity.

STATES SHALL:

- A.** Take all necessary legislative, administrative and other measures to eliminate and prohibit discrimination on the basis of sexual orientation and gender identity in public and private employment, including in relation to vocational training, recruitment, promotion, dismissal, conditions of employment and remuneration;
- B.** Eliminate any discrimination on the basis of sexual orientation or gender identity to ensure equal employment and advancement opportunities in all areas of public service, including all levels of government service and employment in public functions, including serving in the police and military, and provide appropriate training and awareness-raising programmes to counter discriminatory attitudes.

THE RIGHT TO SOCIAL SECURITY AND TO OTHER SOCIAL PROTECTION MEASURES

PRINCIPLE

13

Everyone has the right to social security and other social protection measures, without discrimination on the basis of sexual orientation or gender identity.

STATES SHALL:

- A.** Take all necessary legislative, administrative and other measures to ensure equal access, without discrimination on the basis of sexual orientation or gender identity, to social security and other social protection measures, including employment benefits, parental leave, unemployment benefits, health insurance or care or benefits (including for body modifications related to gender identity), other social insurance, family benefits, funeral benefits, pensions and benefits with regard to the loss of support for spouses or partners as the result of illness or death;
- B.** Ensure that children are not subject to any form of discriminatory treatment within the social security system or in the provision of social or welfare benefits on the basis of their sexual orientation or gender identity, or that of any member of their family;
- C.** Take all necessary legislative, administrative and other measures to ensure access to poverty reduction strategies and programmes, without discrimination on the basis of sexual orientation or gender identity.

PRINCIPLE

14 THE RIGHT TO AN ADEQUATE STANDARD OF LIVING

Everyone has the right to an adequate standard of living, including adequate food, safe drinking water, adequate sanitation and clothing, and to the continuous improvement of living conditions, without discrimination on the basis of sexual orientation or gender identity.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure equal access, without discrimination on the basis of sexual orientation or gender identity, to adequate food, safe drinking water, adequate sanitation and clothing.

PRINCIPLE

15 THE RIGHT TO ADEQUATE HOUSING

Everyone has the right to adequate housing, including protection from eviction, without discrimination on the basis of sexual orientation or gender identity.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure security of tenure and access to affordable, habitable, accessible, culturally appropriate and safe housing, including shelters and other emergency accommodation, without discrimination on the basis of sexual orientation, gender identity or marital or family status;
- B. Take all necessary legislative, administrative and other measures to prohibit the execution of evictions that are not in conformity with their international human rights obligations, and ensure that adequate and effective legal or other appropriate remedies are available to any person claiming that a right to protection against forced evictions has been violated or is under threat of violation, including the right to resettlement, which includes the right to alternative land of better or equal quality and to adequate housing, without discrimination on the basis of sexual orientation, gender identity or marital or family status;
- C. Ensure equal rights to land and home ownership and inheritance without discrimination on the basis of sexual orientation or gender identity;
- D. Establish social programmes, including support programmes, to address factors relating to sexual orientation and gender identity that increase vulnerability to homelessness,

especially for children and young people, including social exclusion, domestic and other forms of violence, discrimination, lack of financial independence, and rejection by families or cultural communities, as well as to promote schemes of neighbourhood support and security;

- E. Provide training and awareness-raising programmes to ensure that all relevant agencies are aware of and sensitive to the needs of those facing homelessness or social disadvantage as a result of sexual orientation or gender identity.

THE RIGHT TO EDUCATION

PRINCIPLE

16

Everyone has the right to education, without discrimination on the basis of, and taking into account, their sexual orientation and gender identity.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure equal access to education, and equal treatment of students, staff and teachers within the education system, without discrimination on the basis of sexual orientation or gender identity;
- B. Ensure that education is directed to the development of each student's personality, talents, and mental and physical abilities to their fullest potential, and responds to the needs of students of all sexual orientations and gender identities;
- C. Ensure that education is directed to the development of respect for human rights, and of respect for each child's parents and family members, cultural identity, language and values, in a spirit of understanding, peace, tolerance and equality, taking into account and respecting diverse sexual orientations and gender identities;
- D. Ensure that education methods, curricula and resources serve to enhance understanding of and respect for, *inter alia*, diverse sexual orientations and gender identities, including the particular needs of students, their parents and family members related to these grounds;
- E. Ensure that laws and policies provide adequate protection for students, staff and teachers of different sexual orientations and gender identities against all forms of social exclusion and violence within the school environment, including bullying and harassment;
- F. Ensure that students subjected to such exclusion or violence are not marginalised or segregated for reasons of protection, and that their best interests are identified and respected in a participatory manner;
- G. Take all necessary legislative, administrative and other measures to ensure that discipline in educational institutions is administered in a manner consistent with human dignity, without discrimination or penalty on the basis of a student's sexual orientation or gender identity, or the expression thereof;

- H. Ensure that everyone has access to opportunities and resources for lifelong learning without discrimination on the basis of sexual orientation or gender identity, including adults who have already suffered such forms of discrimination in the educational system.

PRINCIPLE

17 THE RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH

Everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity. Sexual and reproductive health is a fundamental aspect of this right.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure enjoyment of the right to the highest attainable standard of health, without discrimination on the basis of sexual orientation or gender identity;
- B. Take all necessary legislative, administrative and other measures to ensure that all persons have access to healthcare facilities, goods and services, including in relation to sexual and reproductive health, and to their own medical records, without discrimination on the basis of sexual orientation or gender identity;
- C. Ensure that healthcare facilities, goods and services are designed to improve the health status of, and respond to the needs of, all persons without discrimination on the basis of, and taking into account, sexual orientation and gender identity, and that medical records in this respect are treated with confidentiality;
- D. Develop and implement programmes to address discrimination, prejudice and other social factors which undermine the health of persons because of their sexual orientation or gender identity;
- E. Ensure that all persons are informed and empowered to make their own decisions regarding medical treatment and care, on the basis of genuinely informed consent, without discrimination on the basis of sexual orientation or gender identity;
- F. Ensure that all sexual and reproductive health, education, prevention, care and treatment programmes and services respect the diversity of sexual orientations and gender identities, and are equally available to all without discrimination;
- G. Facilitate access by those seeking body modifications related to gender reassignment to competent, non-discriminatory treatment, care and support;
- H. Ensure that all health service providers treat clients and their partners without discrimination on the basis of sexual orientation or gender identity, including with regard to recognition as next of kin;

- I. Adopt the policies, and programmes of education and training, necessary to enable persons working in the healthcare sector to deliver the highest attainable standard of healthcare to all persons, with full respect for each person's sexual orientation and gender identity.

PROTECTION FROM MEDICAL ABUSES

PRINCIPLE 18

No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure full protection against harmful medical practices based on sexual orientation or gender identity, including on the basis of stereotypes, whether derived from culture or otherwise, regarding conduct, physical appearance or perceived gender norms;
- B. Take all necessary legislative, administrative and other measures to ensure that no child's body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration;
- C. Establish child protection mechanisms whereby no child is at risk of, or subjected to, medical abuse;
- D. Ensure protection of persons of diverse sexual orientations and gender identities against unethical or involuntary medical procedures or research, including in relation to vaccines, treatments or microbicides for HIV/AIDS or other diseases;
- E. Review and amend any health funding provisions or programmes, including those of a development-assistance nature, which may promote, facilitate or in any other way render possible such abuses;
- F. Ensure that any medical or psychological treatment or counselling does not, explicitly or implicitly, treat sexual orientation and gender identity as medical conditions to be treated, cured or suppressed.

PRINCIPLE

19 THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION

Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure full enjoyment of freedom of opinion and expression, while respecting the rights and freedoms of others, without discrimination on the basis of sexual orientation or gender identity, including the receipt and imparting of information and ideas concerning sexual orientation and gender identity, as well as related advocacy for legal rights, publication of materials, broadcasting, organisation of or participation in conferences, and dissemination of and access to safer-sex information;
- B. Ensure that the outputs and the organisation of media that is State-regulated is pluralistic and non-discriminatory in respect of issues of sexual orientation and gender identity and that the personnel recruitment and promotion policies of such organisations are non-discriminatory on the basis of sexual orientation or gender identity;
- C. Take all necessary legislative, administrative and other measures to ensure the full enjoyment of the right to express identity or personhood, including through speech, deportment, dress, bodily characteristics, choice of name or any other means;
- D. Ensure that notions of public order, public morality, public health and public security are not employed to restrict, in a discriminatory manner, any exercise of freedom of opinion and expression that affirms diverse sexual orientations or gender identities;
- E. Ensure that the exercise of freedom of opinion and expression does not violate the rights and freedoms of persons of diverse sexual orientations and gender identities;
- F. Ensure that all persons, regardless of sexual orientation or gender identity, enjoy equal access to information and ideas, as well as to participation in public debate.

THE RIGHT TO FREEDOM OF PEACEFUL ASSEMBLY AND ASSOCIATION

20

Everyone has the right to freedom of peaceful assembly and association, including for the purposes of peaceful demonstrations, regardless of sexual orientation or gender identity. Persons may form and have recognised, without discrimination, associations based on sexual orientation or gender identity, and associations that distribute information to or about, facilitate communication among, or advocate for the rights of, persons of diverse sexual orientations and gender identities.

STATES SHALL:

- A.** Take all necessary legislative, administrative and other measures to ensure the rights to peacefully organise, associate, assemble and advocate around issues of sexual orientation and gender identity, and to obtain legal recognition for such associations and groups, without discrimination on the basis of sexual orientation or gender identity;
- B.** Ensure in particular that notions of public order, public morality, public health and public security are not employed to restrict any exercise of the rights to peaceful assembly and association solely on the basis that it affirms diverse sexual orientations or gender identities;
- C.** Under no circumstances impede the exercise of the rights to peaceful assembly and association on grounds relating to sexual orientation or gender identity, and ensure that adequate police and other physical protection against violence or harassment is afforded to persons exercising these rights;
- D.** Provide training and awareness-raising programmes to law enforcement authorities and other relevant officials to enable them to provide such protection;
- E.** Ensure that information disclosure rules for voluntary associations and groups do not, in practice, have discriminatory effects for such associations and groups addressing issues of sexual orientation or gender identity, or for their members.

PRINCIPLE

21 THE RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

Everyone has the right to freedom of thought, conscience and religion, regardless of sexual orientation or gender identity. These rights may not be invoked by the State to justify laws, policies or practices which deny equal protection of the law, or discriminate, on the basis of sexual orientation or gender identity.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure the right of persons, regardless of sexual orientation or gender identity, to hold and practise religious and non-religious beliefs, alone or in association with others, to be free from interference with their beliefs and to be free from coercion or the imposition of beliefs;
- B. Ensure that the expression, practice and promotion of different opinions, convictions and beliefs with regard to issues of sexual orientation or gender identity is not undertaken in a manner incompatible with human rights.

PRINCIPLE

22 THE RIGHT TO FREEDOM OF MOVEMENT

Everyone lawfully within a State has the right to freedom of movement and residence within the borders of the State, regardless of sexual orientation or gender identity. Sexual orientation and gender identity may never be invoked to limit or impede a person's entry, egress or return to or from any State, including that person's own State.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure that the right to freedom of movement and residence is guaranteed regardless of sexual orientation or gender identity.

THE RIGHT TO SEEK ASYLUM

23

Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity.

STATES SHALL:

- A. Review, amend and enact legislation to ensure that a well-founded fear of persecution on the basis of sexual orientation or gender identity is accepted as a ground for the recognition of refugee status and asylum;
- B. Ensure that no policy or practice discriminates against asylum seekers on the basis of sexual orientation or gender identity;
- C. Ensure that no person is removed, expelled or extradited to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of that person's sexual orientation or gender identity.

THE RIGHT TO FOUND A FAMILY

24

Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members.

STATES SHALL:

- A. Take all necessary legislative, administrative and other measures to ensure the right to found a family, including through access to adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity;
- B. Ensure that laws and policies recognise the diversity of family forms, including those not defined by descent or marriage, and take all necessary legislative, administrative and other measures to ensure that no family may be subjected to discrimination on the basis

of the sexual orientation or gender identity of any of its members, including with regard to family-related social welfare and other public benefits, employment, and immigration;

- C. Take all necessary legislative, administrative and other measures to ensure that in all actions or decisions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration, and that the sexual orientation or gender identity of the child or of any family member or other person may not be considered incompatible with such best interests;
- D. In all actions or decisions concerning children, ensure that a child who is capable of forming personal views can exercise the right to express those views freely, and that such views are given due weight in accordance with the age and maturity of the child;
- E. Take all necessary legislative, administrative and other measures to ensure that in States that recognise same-sex marriages or registered partnerships, any entitlement, privilege, obligation or benefit available to different-sex married or registered partners is equally available to same-sex married or registered partners;
- F. Take all necessary legislative, administrative and other measures to ensure that any obligation, entitlement, privilege, obligation or benefit available to different-sex unmarried partners is equally available to same-sex unmarried partners;
- G. Ensure that marriages and other legally-recognised partnerships may be entered into only with the free and full consent of the intending spouses or partners.

PRINCIPLE

25

THE RIGHT TO PARTICIPATE IN PUBLIC LIFE

Every citizen has the right to take part in the conduct of public affairs, including the right to stand for elected office, to participate in the formulation of policies affecting their welfare, and to have equal access to all levels of public service and employment in public functions, including serving in the police and military, without discrimination on the basis of sexual orientation or gender identity.

STATES SHALL:

- A. Review, amend and enact legislation to ensure the full enjoyment of the right to participate in public and political life and affairs, embracing all levels of government service and employment in public functions, including serving in the police and military, without discrimination on the basis of, and with full respect for, each person's sexual orientation and gender identity;

- B.** Take all appropriate measures to eliminate stereotypes and prejudices regarding sexual orientation and gender identity that prevent or restrict participation in public life;
- C.** Ensure the right of each person to participate in the formulation of policies affecting their welfare, without discrimination on the basis of, and with full respect for, their sexual orientation and gender identity.

THE RIGHT TO PARTICIPATE IN CULTURAL LIFE PRINCIPLE **26**

Everyone has the right to participate freely in cultural life, regardless of sexual orientation or gender identity, and to express, through cultural participation, the diversity of sexual orientation and gender identity.

STATES SHALL:

- A.** Take all necessary legislative, administrative and other measures to ensure opportunities for the participation in cultural life of all persons, regardless of, and with full respect for, their sexual orientations and gender identities;
- B.** Foster dialogue between, and mutual respect among, proponents of the various cultural groups present within the State, including among groups that hold different views on matters of sexual orientation and gender identity, consistently with respect for the human rights referred to in these Principles.

THE RIGHT TO PROMOTE HUMAN RIGHTS PRINCIPLE **27**

Everyone has the right, individually and in association with others, to promote the protection and realisation of human rights at the national and international levels, without discrimination on the basis of sexual orientation or gender identity. This includes activities directed towards the promotion and protection of the rights of persons of diverse sexual orientations and gender identities, as well as the right to develop and discuss new human rights norms and to advocate their acceptance.

STATES SHALL:

- A.** Take all necessary legislative, administrative and other measures to ensure a favourable environment for activities directed towards the promotion, protection and realisation of human rights, including rights relevant to sexual orientation and gender identity;
- B.** Take all appropriate measures to combat actions or campaigns targeting human rights defenders working on issues of sexual orientation and gender identity, as well as those targeting human rights defenders of diverse sexual orientations and gender identities;
- C.** Ensure that human rights defenders, regardless of their sexual orientation or gender identity, and regardless of the human rights issues they advocate, enjoy non-discriminatory access to, participation in, and communication with, national and international human rights organisations and bodies;
- D.** Ensure the protection of human rights defenders, working on issues of sexual orientation and gender identity, against any violence, threat, retaliation, *de facto* or *de jure* discrimination, pressure, or any other arbitrary action perpetrated by the State, or by non-State actors, in response to their human rights activities. The same protection should be ensured, to human rights defenders working on any issue, against any such treatment based on their sexual orientation or gender identity;
- E.** Support the recognition and accreditation of organisations that promote and protect the human rights of persons of diverse sexual orientations and gender identities at the national and international levels.

PRINCIPLE

28 THE RIGHT TO EFFECTIVE REMEDIES AND REDRESS

Every victim of a human rights violation, including of a violation based on sexual orientation or gender identity, has the right to effective, adequate and appropriate remedies. Measures taken for the purpose of providing reparation to, or securing adequate advancement of, persons of diverse sexual orientations and gender identities are integral to the right to effective remedies and redress.

STATES SHALL:

- A.** Establish the necessary legal procedures, including through the revision of legislation and policies, to ensure that victims of human rights violations on the basis of sexual orientation or gender identity have access to full redress through restitution, compensation, rehabilitation, satisfaction, guarantee of non-repetition, and/or any other means as appropriate;

- B.** Ensure that remedies are enforced and implemented in a timely manner;
- C.** Ensure that effective institutions and standards for the provision of remedies and redress are established, and that all personnel are trained in issues of human rights violations based on sexual orientation and gender identity;
- D.** Ensure that all persons have access to all necessary information about the processes for seeking remedies and redress;
- E.** Ensure that financial aid is provided to those who are unable to afford the cost of securing redress, and that any other obstacles to securing such redress, financial or otherwise, are removed;
- F.** Ensure training and awareness-raising programmes, including measures aimed at teachers and students at all levels of public education, at professional bodies, and at potential violators of human rights, to promote respect for and adherence to international human rights standards in accordance with these Principles, as well as to counter discriminatory attitudes based on sexual orientation or gender identity.

ACCOUNTABILITY PRINCIPLE 29

Everyone whose human rights, including rights addressed in these Principles, are violated is entitled to have those directly or indirectly responsible for the violation, whether they are government officials or not, held accountable for their actions in a manner that is proportionate to the seriousness of the violation. There should be no impunity for perpetrators of human rights violations related to sexual orientation or gender identity.

STATES SHALL:

- A.** Establish appropriate, accessible and effective criminal, civil, administrative and other procedures, as well as monitoring mechanisms, to ensure the accountability of perpetrators for human rights violations related to sexual orientation or gender identity;
- B.** Ensure that all allegations of crimes perpetrated on the basis of the actual or perceived sexual orientation or gender identity of the victim, including such crimes described in these Principles, are investigated promptly and thoroughly, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished;
- C.** Establish independent and effective institutions and procedures to monitor the formulation and enforcement of laws and policies to ensure the elimination of discrimination on the basis of sexual orientation or gender identity;
- D.** Remove any obstacles preventing persons responsible for human rights violations based on sexual orientation or gender identity from being held accountable.

ADDITIONAL RECOMMENDATIONS

All members of society and of the international community have responsibilities regarding the realisation of human rights. We therefore recommend that:

- A.** The United Nations High Commissioner for Human Rights endorse these Principles, promote their implementation worldwide, and integrate them into the work of the Office of the High Commissioner for Human Rights, including at the field-level;
- B.** The United Nations Human Rights Council endorse these Principles and give substantive consideration to human rights violations based on sexual orientation or gender identity, with a view to promoting State compliance with these Principles;
- C.** The United Nations Human Rights Special Procedures pay due attention to human rights violations based on sexual orientation or gender identity, and integrate these Principles into the implementation of their respective mandates;
- D.** The United Nations Economic and Social Council recognise and accredit non-governmental organisations whose aim is to promote and protect the human rights of persons of diverse sexual orientations and gender identities, in accordance with its *Resolution 1996/31*;
- E.** The United Nations Human Rights Treaty Bodies vigorously integrate these Principles into the implementation of their respective mandates, including their case law and the examination of State reports, and, where appropriate, adopt General Comments or other interpretive texts on the application of human rights law to persons of diverse sexual orientations and gender identities;
- F.** The World Health Organization and UNAIDS develop guidelines on the provision of appropriate health services and care, responding to the health needs of persons related to their sexual orientation or gender identity, with full respect for their human rights and dignity;
- G.** The UN High Commissioner for Refugees integrate these Principles in efforts to protect persons who experience, or have a well-founded fear of, persecution on the basis of sexual orientation or gender identity, and ensure that no person is discriminated against on the basis of sexual orientation or gender identity in relation to the receipt of humanitarian assistance or other services, or the determination of refugee status;
- H.** Regional and sub-regional inter-governmental organisations with a commitment to human rights, as well as regional human rights treaty bodies, ensure that the promotion of these Principles is integral to the implementation of the mandates of their various human rights mechanisms, procedures and other arrangements and initiatives;
- I.** Regional human rights courts vigorously integrate those Principles that are relevant to the human rights treaties they interpret into their developing case law on sexual orientation and gender identity;
- J.** Non-governmental organisations working on human rights at the national, regional and international levels promote respect for these Principles within the framework of their specific mandates;

- K.** Humanitarian organisations incorporate these Principles into any humanitarian or relief operations, and refrain from discriminating against persons on the basis of sexual orientation or gender identity in the provision of aid and other services;
- L.** National human rights institutions promote respect for these Principles by State and non-State actors, and integrate into their work the promotion and protection of the human rights of persons of diverse sexual orientations or gender identities;
- M.** Professional organisations, including those in the medical, criminal or civil justice, and educational sectors, review their practices and guidelines to ensure that they vigorously promote the implementation of these Principles;
- N.** Commercial organisations acknowledge and act upon the important role they have in both ensuring respect for these Principles with regard to their own workforces and in promoting these Principles nationally and internationally;
- O.** The mass media avoid the use of stereotypes in relation to sexual orientation and gender identity, and promote tolerance and the acceptance of diversity of human sexual orientation and gender identity, and raise awareness around these issues;
- P.** Governmental and private funders provide financial assistance, to non-governmental and other organisations, for the promotion and protection of the human rights of persons of diverse sexual orientations and gender identities.

THESE PRINCIPLES AND RECOMMENDATIONS reflect the application of international human rights law to the lives and experiences of persons of diverse sexual orientations and gender identities, and nothing herein should be interpreted as restricting or in any way limiting the rights and freedoms of such persons as recognised in international, regional or national law or standards.

ANNEX

SIGNATORIES TO THE YOGYAKARTA PRINCIPLES

Philip Alston (Australia), UN Special Rapporteur on extrajudicial, summary and arbitrary executions and Professor of Law, New York University School of Law, USA

Maxim Anmeghichean (Moldova), European Region of the International Lesbian and Gay Association

Mauro Cabral (Argentina), Researcher Universidad Nacional de Córdoba, Argentina, International Gay and Lesbian Human Rights Commission

Edwin Cameron (South Africa), Justice, Supreme Court of Appeal, Bloemfontein, South Africa

Sonia Onufer Corrêa (Brazil), Research Associate at the Brazilian Interdisciplinary AIDS Association (ABIA) and co-chair of Sexuality Policy Watch (Co-Chair of the experts' meeting)

Yakin Ertürk (Turkey), UN Special Rapporteur on Violence against Women, Professor, Department of Sociology, Middle East Technical University, Ankara, Turkey

Elizabeth Evatt (Australia), Former member and chair of the UN Committee on the Elimination of Discrimination Against Women, former member of the UN Human Rights Committee and Commissioner of the International Commission of Jurists

Paul Hunt (New Zealand), UN Special Rapporteur on the right to the highest attainable standard of health and Professor, Department of Law, University of Essex, United Kingdom

Asma Jahangir (Pakistan), Chairperson, Human Rights Commission of Pakistan

Maina Kiai (Kenya), Chairperson, Kenya National Commission on Human Rights

Miloon Kothari (India), UN Special Rapporteur on the right to adequate housing

Judith Mesquita (United Kingdom), Senior Research Officer, Human Rights Centre, University of Essex, United Kingdom

Alice M. Miller (United States of America), Assistant Professor, School of Public Health, Co-Director, Human Rights Program, Columbia University, USA

Sanji Mmasenono Monageng (Botswana), Judge of the High Court (The Republic of the Gambia), Commissioner of the African Commission on Human and Peoples' Rights, Chairperson of the Follow Up Committee on the implementation of the Robben Island Guidelines on prohibition and prevention of Torture and other Cruel, Inhuman or Degrading Treatment (African Commission on Human and Peoples' Rights)

Vitit Muntarbhorn (Thailand), UN Special Rapporteur on the human rights situation in the Democratic People's Republic of Korea and Professor of Law at Chulalongkorn University, Thailand, (Co-Chair of the experts' meeting)

Lawrence Mute (Kenya), Commissioner with the Kenya National Commission on Human Rights

Manfred Nowak (Austria), UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, member of the International Commission of Jurists, Professor of Human Rights at Vienna University, Austria and Director of the Ludwig Boltzmann Institute of Human Rights

Ana Elena Obando Mendoza (Costa Rica), feminist attorney, women's human rights activist, and international consultant

Michael O'Flaherty (Ireland), Member of the UN Human Rights Committee and Professor of Applied Human Rights and Co-Director of the Human Rights Law Centre at the University of Nottingham, United Kingdom (Rapporteur for the development of the Yogyakarta Principles)

Sunil Pant (Nepal), President of the Blue Diamond Society, Nepal

Dimitrina Petrova (Bulgaria), Executive Director, The Equal Rights Trust

Rudi Mohammed Rizki (Indonesia), UN Special Rapporteur on international solidarity and Senior Lecturer and Vice Dean for Academic Affairs of the Faculty of Law at the University of Padjadjaran, Indonesia

Mary Robinson (Ireland), Founder of Realizing Rights: The Ethical Globalization Initiative and former President of Ireland and former United Nations High Commissioner for Human Rights

Nevena Vuckovic Sahovic (Serbia), Member of the UN Committee on the Rights of the Child and President of the Child Rights Centre, Belgrade, Serbia

Martin Scheinin (Finland), UN Special Rapporteur on human rights and counter-terrorism, Professor of Constitutional and International Law and Director of the Institute for Human Rights, Åbo Akademi University, Finland

Wan Yanhai (China), Founder of the AIZHI Action Project and director of Beijing AIZHIXING Institute of Health Education

Stephen Whittle (United Kingdom), Professor in Equalities Law at Manchester Metropolitan University, United Kingdom

Roman Wieruszewski (Poland), Member of the UN Human Rights Committee and head of Poznan Centre for Human Rights, Poland

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Annexure A

THE YOGYAKARTA PRINCIPLES *plus 10*

**ADDITIONAL PRINCIPLES AND STATE OBLIGATIONS
ON THE APPLICATION OF INTERNATIONAL HUMAN
RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION,
GENDER IDENTITY, GENDER EXPRESSION AND
SEX CHARACTERISTICS TO COMPLEMENT THE
YOGYAKARTA PRINCIPLES**

As adopted on 10 November 2017, Geneva

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INTRODUCTION

Since the Yogyakarta Principles were adopted in 2006, they have developed into an authoritative statement of the human rights of persons of 'diverse sexual orientations and gender identities'. The period since then, has seen significant developments both in the field of international human rights law and in the understanding of violations affecting persons of 'diverse sexual orientations and gender identities', as well as a recognition of the often distinct violations affecting persons on grounds of 'gender expression' and 'sex characteristics'.

The Yogyakarta Principles plus 10 (YP+10) aims to document and elaborate these developments through a set of Additional Principles and State Obligations. YP+10 should be read alongside the original 29 Yogyakarta Principles. Together, these documents provide an authoritative, expert exposition of international human rights law as it currently applies to the grounds of sexual orientation, gender identity, gender expression and sex characteristics.

The YP+10 document supplements the original 29 Yogyakarta Principles and, in fact, derives its *raison d'être* from preambular paragraph 9 of those Principles:

“ACKNOWLEDGING that this articulation must rely on the current state of international human rights law and will require revision on a regular basis in order to take account of developments in that law and its application to the particular lives and experiences of persons of diverse sexual orientations and gender identities over time and in diverse regions and countries.”

This set of nine Additional Principles and 111 Additional State Obligations cover a range of rights whose articulation has emerged from the intersection of the developments in international human rights law with the emerging understanding of violations suffered by persons on grounds of sexual orientation and gender identity and the recognition of the distinct and intersectional grounds of gender expression and sex characteristics.

On the occasion of the tenth anniversary of the Yogyakarta Principles, the International Service for Human Rights and ARC International in consultation with experts and civil society stakeholders, established a Drafting Committee tasked with developing the YP+10 document.

The entire process was aided by a Secretariat comprised of civil society representatives and institutions. The Drafting Committee, once constituted, put out an open call for submissions in order to ensure that the output would be informed both by developments in international human rights law and by lived experience. Drawing both on the submissions received, as well as relevant research and expertise, the Drafting Committee prepared a Draft Document which was then discussed, substantially elaborated and adopted following an Experts' Meeting held in Geneva from 18-20 September 2017. The experts included persons from all regions, from multiple legal traditions, and of diverse sexual orientations, gender identities, gender expressions and sex characteristics.

The YP +10 document was thus informed by an open consultation among multiple stakeholders in the field and hence reflects some of the key issues and developments relating to the specific forms of rights violations experienced by persons on grounds of sexual orientation, gender identity, gender expression and sex characteristics.

The YP+10 document is an affirmation of existing international legal standards as they apply to all persons on grounds of their sexual orientation, gender identity, gender expression and sex characteristics. States must comply with these principles both as a legal obligation and as an aspect of their commitment to universal human rights.

Members of the Drafting Committee:

Mauro Cabral Grinspan

Morgan Carpenter

Julia Ehrt

Sheherezade Kara

Arvind Narrain

Pooja Patel

Chris Sidoti

Monica Tabengwa

WE, THE SECOND INTERNATIONAL PANEL OF EXPERTS IN INTERNATIONAL HUMAN RIGHTS LAW, SEXUAL ORIENTATION, GENDER IDENTITY, GENDER EXPRESSION AND SEX CHARACTERISTICS

PREAMBLE

RECALLING that the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity, adopted in November 2006, provided in a preambular paragraph that the Yogyakarta Principles must rely on the current state of international law and will require revision on a regular basis in order to take account of developments in that law and its application to the particular lives and experiences of persons of diverse sexual orientations and gender identities over time and in diverse regions and countries;

NOTING that there have been significant developments in international human rights law and jurisprudence on issues relating to sexual orientation, gender identity, gender expression and sex characteristics, since the adoption of the Yogyakarta Principles;

RECALLING the Yogyakarta Principles' definitions of 'sexual orientation' and 'gender identity';

UNDERSTANDING 'gender expression' as each person's presentation of the person's gender through physical appearance – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names and personal references, and noting further that gender expression may or may not conform to a person's gender identity;

NOTING that 'gender expression' is included in the definition of gender identity in the Yogyakarta Principles and, as such, all references to gender identity should be understood to be inclusive of gender expression as a ground for protection;

UNDERSTANDING 'sex characteristics' as each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty;

NOTING that 'sex characteristics' as an explicit ground for protection from violations of human rights has evolved in international jurisprudence, and recognising that the Yogyakarta Principles apply equally to the ground of sex characteristics as to the grounds of sexual orientation, gender identity and gender expression;

INCLUDING, in sexual orientation, gender identity, gender expression and sex characteristics, actual, perceived and attributed sexual orientation, gender identity, gender expression and sex characteristics as the case may be;

RECOGNISING that the needs, characteristics and human rights situations of persons and populations of diverse sexual orientations, gender identities, gender expressions and sex characteristics are distinct from each other;

NOTING that sexual orientation, gender identity, gender expression and sex characteristics are each distinct and intersectional grounds of discrimination, and that they may be, and commonly are, compounded by discrimination on other grounds including race, ethnicity, indigeneity, sex, gender, language, religion, belief, political or other opinion, nationality, national or social origin, economic and social situation, birth, age, disability, health (including HIV status), migration, marital or family status, being a human rights defender or other status;

NOTING that violence, discrimination, and other harm based on sexual orientation, gender identity, gender expression and sex characteristics manifests in a continuum of multiple, interrelated and recurring forms, in a range of settings, from private to public, including technology-mediated settings, and in the contemporary globalised world it transcends national boundaries;

RECOGNISING that violence, discrimination and other harm based on sexual orientation, gender identity, gender expression and sex characteristics have an individual as well as a collective dimension and that acts of violence and discrimination which target the individual person are also an attack on human diversity, and on the universality and indivisibility of human rights;

ACKNOWLEDGING that the following Additional Principles, State Obligations and Recommendations are based on the current state of international human rights law and will require revision on a regular basis in order to take account of legal, scientific and societal developments and their application to the particular lives and experiences of persons of diverse sexual orientations, gender identities, gender expressions and sex characteristics over time and in diverse regions and countries.

**FOLLOWING CONSULTATION WITH EXPERTS AND AN
EXPERTS' MEETING HELD IN GENEVA, SWITZERLAND,
FROM 18 TO 20 SEPTEMBER 2017, HEREBY ADOPT THESE
PRINCIPLES AND, IN DOING SO:**

AFFIRM the continuing validity of the original 29 Yogyakarta Principles of 2006;
DECLARE these Additional Principles, State Obligations and Recommendations as
supplementary to the original Yogyakarta Principles.

ADDITIONAL PRINCIPLES

PRINCIPLE

30

THE RIGHT TO STATE PROTECTION

Everyone, regardless of sexual orientation, gender identity, gender expression or sex characteristics, has the right to State protection from violence, discrimination and other harm, whether by government officials or by any individual or group.

STATES SHALL:

- A. Exercise due diligence to prevent, investigate, prosecute, punish and provide remedies for discrimination, violence and other harm, whether committed by State or non-State actors;
- B. Take appropriate and effective measures to eradicate all forms of violence, discrimination and other harm, including any advocacy of hatred that constitutes incitement to discrimination, hostility, or violence on grounds of sexual orientation, gender identity, gender expression or sex characteristics, whether by public or private actors;
- C. Compile statistics and research on the extent, causes and effects of violence, discrimination and other harm, and on the effectiveness of measures to prevent, prosecute and provide reparation for such harm on grounds of sexual orientation, gender identity, gender expression and sex characteristics;
- D. Identify the nature and extent of attitudes, beliefs, customs and practices that perpetuate violence, discrimination and other harm on grounds of sexual orientation, gender identity, gender expression and sex characteristics, and report on the measures undertaken, and their effectiveness, in eradicating such harm;
- E. Develop, implement and support education and public information programmes to promote human rights and to eliminate prejudices on grounds of sexual orientation, gender identity, gender expression and sex characteristics;
- F. Ensure sensitivity training of judicial and law enforcement officers and other public officials on issues relating to sexual orientation, gender identity, gender expression and sex characteristics;
- G. Ensure that laws against rape, sexual assault and sexual harassment protect all persons regardless of their sexual orientation, gender identity, gender expression and sex characteristics;
- H. Establish support services for victims of rape, sexual assault and harassment, and other forms of violence and harm on grounds of sexual orientation, gender identity, gender expression, and sex characteristics;

- I. Ensure that human rights violations are vigorously investigated and, where evidence is found, those responsible are prosecuted and, if convicted, punished as appropriate;
- J. Ensure access to effective complaints procedures and remedies, including reparation, for victims of violence, discrimination and other harm on grounds of sexual orientation, gender identity, gender expression and sex characteristics.

THE RIGHT TO LEGAL RECOGNITION

PRINCIPLE 31

Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them.

STATES SHALL:

- A. Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality;
- B. Ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person;
- C. While sex or gender continues to be registered:
 - i. Ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person's self-defined gender identity;
 - ii. Make available a multiplicity of gender marker options;
 - iii. Ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion, shall be a prerequisite to change one's name, legal sex or gender;
 - iv. Ensure that a person's criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.

PRINCIPLE

32

THE RIGHT TO BODILY AND MENTAL INTEGRITY

Everyone has the right to bodily and mental integrity, autonomy and self-determination irrespective of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to be free from torture and cruel, inhuman and degrading treatment or punishment on the basis of sexual orientation, gender identity, gender expression and sex characteristics. No one shall be subjected to invasive or irreversible medical procedures that modify sex characteristics without their free, prior and informed consent, unless necessary to avoid serious, urgent and irreparable harm to the concerned person.

STATES SHALL:

- A. Guarantee and protect the rights of everyone, including all children, to bodily and mental integrity, autonomy and self-determination;
- B. Ensure that legislation protects everyone, including all children, from all forms of forced, coercive or otherwise involuntary modification of their sex characteristics;
- C. Take measures to address stigma, discrimination and stereotypes based on sex and gender, and combat the use of such stereotypes, as well as marriage prospects and other social, religious and cultural rationales, to justify modifications to sex characteristics, including of children;
- D. Bearing in mind the child's right to life, non-discrimination, the best interests of the child, and respect for the child's views, ensure that children are fully consulted and informed regarding any modifications to their sex characteristics necessary to avoid or remedy proven, serious physical harm, and ensure that any such modifications are consented to by the child concerned in a manner consistent with the child's evolving capacity;
- E. Ensure that the concept of the best interest of the child is not manipulated to justify practices that conflict with the child's right to bodily integrity;
- F. Provide adequate, independent counselling and support to victims of violations, their families and communities, to enable victims to exercise and affirm rights to bodily and mental integrity, autonomy and self-determination;
- G. Prohibit the use of anal and genital examinations in legal and administrative proceedings and criminal prosecutions unless required by law, as relevant, reasonable, and necessary for a legitimate purpose.

THE RIGHT TO FREEDOM FROM CRIMINALISATION AND SANCTION ON THE BASIS OF SEXUAL ORIENTATION, GENDER IDENTITY, GENDER EXPRESSION, OR SEX CHARACTERISTICS

Everyone has the right to be free from criminalisation and any form of sanction arising directly or indirectly from that person's actual or perceived sexual orientation, gender identity, gender expression or sex characteristics.

STATES SHALL:

- A. Ensure that legal provisions, including in customary, religious and indigenous laws, whether explicit provisions, or the application of general punitive provisions such as acts against nature, morality, public decency, vagrancy, sodomy and propaganda laws, do not criminalise sexual orientation, gender identity and expression, or establish any form of sanction relating to them;
- B. Repeal other forms of criminalisation and sanction impacting on rights and freedoms on the basis of sexual orientation, gender identity, gender expression or sex characteristics, including the criminalisation of sex work, abortion, unintentional transmission of HIV, adultery, nuisance, loitering and begging;
- C. Pending repeal, cease to apply discriminatory laws criminalising or applying general punitive sanctions on the basis of sexual orientation, gender identity, gender expression or sex characteristics;
- D. Expunge any convictions and erase any criminal records for past offences associated with laws arbitrarily criminalising persons on the basis of sexual orientation, gender identity, gender expression and sex characteristics;
- E. Ensure training for the judiciary, law enforcement officers and healthcare providers in relation to their human rights obligations regarding sexual orientation, gender identity, gender expression and sex characteristics;
- F. Ensure that law enforcement officers and other individuals and groups are held accountable for any act of violence, intimidation or abuse based on the criminalisation of sexual orientation, gender identity, gender expression and sex characteristics;
- G. Ensure effective access to legal support systems, justice and remedies for those who are affected by criminalisation and penalisation on grounds of sexual orientation, gender identity, gender expression and sex characteristics;
- H. Decriminalise body modification procedures and treatments that are carried out with prior, free and informed consent of the person.

PRINCIPLE

34

THE RIGHT TO PROTECTION FROM POVERTY

Everyone has the right to protection from all forms of poverty and social exclusion associated with sexual orientation, gender identity, gender expression and sex characteristics. Poverty is incompatible with respect for the equal rights and dignity of all persons, and can be compounded by discrimination on the grounds of sexual orientation, gender identity, gender expression and sex characteristics.

STATES SHALL:

- A. Take all necessary legislative, administrative, budgetary and other measures, including economic policies, to ensure the progressive reduction and elimination of all forms of poverty associated with or exacerbated by sexual orientation, gender identity, gender expression or sex characteristics;
- B. Promote social and economic inclusion of persons marginalised on the basis of sexual orientation, gender identity, gender expression and sex characteristics;
- C. Ensure the participation and inclusion of those experiencing poverty on grounds of sexual orientation, gender identity, gender expression and sex characteristics in the adoption and implementation of legislative, administrative, budgetary and other measures to combat poverty;
- D. Ensure appropriate institutional arrangements and data collection with the view to reduce poverty and social exclusion related to sexual orientation, gender identity, gender expression and sex characteristics;
- E. Ensure access to effective remedies for violations of human rights, including those caused by non-State actors, that result in poverty and exclusion, and that adversely affect persons on the grounds of sexual orientation, gender identity, gender expression and sex characteristics.

PRINCIPLE

35

THE RIGHT TO SANITATION

Everyone has the right to equitable, adequate, safe and secure sanitation and hygiene, in circumstances that are consistent with human dignity, without discrimination, including on the basis of sexual orientation, gender identity, gender expression or sex characteristics.

STATES SHALL:

- A. Ensure that there are adequate public sanitation facilities which can be accessed safely and with dignity by all persons regardless of their sexual orientation, gender identity, gender expression or sex characteristics;

- B. Ensure that all schools and other institutional settings provide safe access to sanitation facilities to staff, students and visitors without discrimination on grounds of sexual orientation, gender identity, gender expression or sex characteristics;
- C. Ensure that both public and private employers provide safe access to sanitation without discrimination on grounds of sexual orientation, gender identity, gender expression or sex characteristics;
- D. Ensure that entities offering services to the public provide adequate sanitation without discrimination, including on grounds of sexual orientation, gender identity, gender expression or sex characteristics;
- E. Ensure that places of detention have adequate sanitation facilities which can be accessed safely and with dignity by all detainees, staff and visitors without discrimination on grounds of sexual orientation, gender identity, gender expression or sex characteristics.

THE RIGHT TO THE ENJOYMENT OF HUMAN RIGHTS IN RELATION TO INFORMATION AND COMMUNICATION TECHNOLOGIES

PRINCIPLE 36

Everyone is entitled to the same protection of rights online as they are offline. Everyone has the right to access and use information and communication technologies, including the internet, without violence, discrimination or other harm based on sexual orientation, gender identity, gender expression or sex characteristics. Secure digital communications, including the use of encryption, anonymity and pseudonymity tools are essential for the full realisation of human rights, in particular the rights to life, bodily and mental integrity, health, privacy, due process, freedom of opinion and expression, peaceful assembly and association.

STATES SHALL:

- A. Take all necessary measures to ensure that all persons enjoy universal, affordable, open, safe, secure and equal access to information and communication technologies, including the internet, without discrimination based on sexual orientation, gender identity, gender expression or sex characteristics;
- B. Ensure the right of all individuals, without discrimination based on sexual orientation, gender identity, gender expression or sex characteristics, to seek, receive and impart information and ideas of all kinds, including those concerning sexual orientation, gender identity, gender expression and sex characteristics, through information and communication technologies;

- C. Ensure that any restrictions to the right to access and use information and communication technologies and the internet are provided for by law and are necessary and proportionate to protect the human dignity, equality and freedoms of others, without discrimination on the basis of sexual orientation, gender identity, gender expression or sex characteristics;
- D. Respect and protect the privacy and security of digital communications, including the use by individuals of encryption, pseudonyms and anonymity technology;
- E. Ensure that any restrictions on the right to privacy, including through mass or targeted surveillance, requests for access to personal data, or through limitations on the use of encryption, pseudonymity and anonymity tools, are on a case specific basis, and are reasonable, necessary and proportionate as required by the law for a legitimate purpose and ordered by a court;
- F. Take measures to ensure that the processing of personal data for individual profiling is consistent with relevant human rights standards including personal data protection and does not lead to discrimination, including on the grounds of sexual orientation, gender identity, gender expression and sex characteristics;
- G. Take all necessary legislative, administrative, technical and other measures, including ensuring private sector accountability, as outlined by relevant international standards, in consultation with relevant stakeholders, to seek to prevent, remedy and eliminate online hate speech, harassment and technology-related violence against persons on the basis of sexual orientation, gender identity, gender expression or sex characteristics under the framework of international human rights law.

PRINCIPLE

37 THE RIGHT TO TRUTH

Every victim of a human rights violation on the basis of sexual orientation, gender identity, gender expression or sex characteristics has the right to know the truth about the facts, circumstances and reasons why the violation occurred. The right to truth includes effective, independent and impartial investigation to establish the facts, and includes all forms of reparation recognised by international law. The right to truth is not subject to statute of limitations and its application must bear in mind its dual nature as an individual right and the right of the society at large to know the truth about past events.

STATES SHALL:

- A. Adopt legal provisions to provide redress to victims of violations on the basis of sexual orientation, gender identity, gender expression and sex characteristics, including public apology, expungement of relevant criminal convictions and records, rehabilitation and recovery services, adequate compensation and guarantees of non-recurrence;

- B. Ensure, in cases of violations of the right to mental and bodily integrity, effective access to remedies, redress, reparation and, where appropriate, psychological support and restorative treatments;
- C. Protect individuals' right to know the truth about their medical histories, including through full access to accurate medical records;
- D. Adopt and fully implement procedures to establish the truth concerning violations based on sexual orientation, gender identity, gender expression and sex characteristics;
- E. Establish a truth-seeking mechanism and process in regard to human rights violations based on sexual orientation, gender identity, gender expression and sex characteristics;
- F. Ensure that, in addition to individual victims and their families, communities and society at large can realise the right to the truth about systemic human rights violations based on sexual orientation, gender identity, gender expression and sex characteristics, while respecting and protecting the right to privacy of individuals;
- G. Preserve documentary evidence of human rights violations based on sexual orientation, gender identity, gender expression and sex characteristics, and ensure adequate access to archives with information on violations based on sexual orientation, gender identity, gender expression and sex characteristics;
- H. Ensure that the facts and truth of the history, causes, nature and consequences of discrimination and violence on grounds of sexual orientation, gender identity, gender expression and sex characteristics are disseminated and added to educational curricula with a view to achieving a comprehensive and objective awareness of past treatment of persons on grounds of sexual orientation, gender identity, gender expression and sex characteristics;
- I. Commemorate the suffering of victims of violations on the basis of sexual orientation, gender identity, gender expression and sex characteristics through public events, museums and other social and cultural activities.

PRINCIPLE

38

THE RIGHT TO PRACTISE, PROTECT, PRESERVE AND REVIVE CULTURAL DIVERSITY

Everyone, individually or in association with others, where consistent with the provisions of international human rights law, has the right to practise, protect, preserve and revive cultures, traditions, languages, rituals and festivals, and protect cultural sites of significance, associated with sexual orientation, gender identity, gender expression and sex characteristics. Everyone, individually or in association with others, has the right to manifest cultural diversity through artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used, without discrimination based on sexual orientation, gender identity, gender expression or sex characteristics. Everyone, individually or in association with others, has the right to seek, receive, provide and utilise resources for these purposes without discrimination on the basis of sexual orientation, gender identity, gender expression or sex characteristics.

STATES SHALL:

- A . Ensure the right to practice, protect, preserve and revive the diversity of cultural expressions of persons of all sexual orientations, gender identities, gender expressions and sex characteristics on the basis of the equal dignity of and respect for all.

ADDITIONAL STATE OBLIGATIONS

RELATING TO THE RIGHTS TO EQUALITY AND NON-DISCRIMINATION (PRINCIPLE 2)

STATES SHALL:

- G. Take all appropriate steps to ensure that reasonable accommodation is provided, where needed, in order to promote equality and eliminate discrimination on the basis of sexual orientation, gender identity, gender expression or sex characteristics, including in education, employment, and access to services;
- H. Ensure that HIV status is not used as a pretext to isolate, marginalise or exclude persons of diverse sexual orientations, gender identities, gender expressions or sex characteristics, or prevent them from accessing goods, commodities and services;
- I. Ensure that all individuals can participate in sport in line with the gender with which they identify, subject only to reasonable, proportionate and non-arbitrary requirements;
- J. Ensure that all individuals can participate in sport without discrimination on the grounds of sexual orientation, gender identity, gender expression or sex characteristics;
- K. Adopt legislative, policy and other measures in line with international human rights norms and standards to eliminate bullying and discriminatory behaviour at all levels of sports, on the basis of sexual orientation, gender identity, gender expression and sex characteristics;
- L. Combat the practice of prenatal selection on the basis of sex characteristics, including by addressing the root causes of discrimination against persons on the basis of sex, gender, sexual orientation, gender identity, gender expression and sex characteristics, and by carrying out awareness-raising activities on the detrimental impact of prenatal selection on these grounds;
- M. Take measures to address discriminatory attitudes and practices on the basis of sex, gender, sexual orientation, gender identity, gender expression and sex characteristics in relation to the application of prenatal treatments and genetic modification technologies.

RELATING TO THE RIGHT TO PRIVACY (PRINCIPLE 6)

STATES SHALL:

- G. Ensure that requirements for individuals to provide information on their sex or gender are relevant, reasonable and necessary as required by the law for a legitimate purpose in the circumstances where it is sought, and that such requirements respect all persons' right to self-determination of gender;
- H. Ensure that changes of the name or gender marker, as long as the latter exists, is not disclosed without the prior, free, and informed consent of the person concerned, unless ordered by a court.

RELATING TO THE RIGHT TO TREATMENT WITH HUMANITY WHILE IN DETENTION (PRINCIPLE 9)

STATES SHALL:

- H. Adopt and implement policies to combat violence, discrimination and other harm on grounds of sexual orientation, gender identity, gender expression or sex characteristics faced by persons who are deprived of their liberty, including with respect to such issues as placement, body or other searches, items to express gender, access to and continuation of gender affirming treatment and medical care, and "protective" solitary confinement;
- I. Adopt and implement policies on placement and treatment of persons who are deprived of their liberty that reflect the needs and rights of persons of all sexual orientations, gender identities, gender expressions, and sex characteristics and ensure that persons are able to participate in decisions regarding the facilities in which they are placed;
- J. Provide for effective oversight of detention facilities, both with regard to public and private custodial care, with a view to ensuring the safety and security of all persons, and addressing the specific vulnerabilities associated with sexual orientation, gender identity, gender expression and sex characteristics.

RELATING TO THE RIGHT TO FREEDOM FROM TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (PRINCIPLE 10)

STATES SHALL:

- D. Recognise that forced, coercive and otherwise involuntary modification of a person's sex characteristics may amount to torture, or other cruel, inhuman or degrading treatment;
- E. Prohibit any practice, and repeal any laws and policies, allowing intrusive and irreversible treatments on the basis of sexual orientation, gender identity, gender expression or sex characteristics, including forced genital-normalising surgery, involuntary sterilisation, unethical experimentation, medical display, "reparative" or "conversion" therapies, when enforced or administered without the free, prior, and informed consent of the person concerned.

RELATING TO THE RIGHT TO EDUCATION (PRINCIPLE 16)

STATES SHALL:

- I. Ensure inclusion of comprehensive, affirmative and accurate material on sexual, biological, physical and psychological diversity, and the human rights of people of diverse sexual orientations, gender identities, gender expressions and sex characteristics, in curricula, taking into consideration the evolving capacity of the child;
- J. Ensure inclusion of comprehensive, affirmative and accurate material on sexual, biological, physical and psychological diversity, and the human rights of people of diverse sexual orientations, gender identities, gender expressions and sex characteristics, in teacher training and continuing professional development programmes.

RELATING TO THE RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH (PRINCIPLE 17)

STATES SHALL:

- J. Protect all persons from discrimination, violence and other harm on the basis of sexual orientation, gender identity, gender expression and sex characteristics in healthcare settings;
- K. Ensure access to the highest attainable standard of gender affirming healthcare, on the basis of an individual's free, prior and informed consent;
- L. Ensure that gender affirming healthcare is provided by the public health system or, if not so provided, that the costs are covered or reimbursable under private and public health insurance schemes;
- M. Take all necessary measures to eliminate all forms of sexual and reproductive violence on the basis of sexual orientation, gender identity, gender expression and sex characteristics, including forced marriage, rape and forced pregnancy;
- N. Ensure access, without discrimination on the grounds of sexual orientation, gender identity, gender expression, or sex characteristics, to pre and post-exposure prophylaxis (PrEP and PEP);
- O. Ensure access to a range of safe, affordable and effective contraceptives, including emergency contraception, and to information and education on family planning and sexual and reproductive health, without discrimination based on sexual orientation, gender identity, gender expression and sex characteristics;
- P. Take all necessary legislative and other measures to ensure access to quality post abortion care, and remove any barriers that may hinder timely access to affordable and quality abortion services, without discrimination based on sexual orientation, gender identity, gender expression or sex characteristics;
- Q. Prevent the disclosure of HIV status, as well as personal health and medical information related to sexual orientation, gender identity, gender expression and sex characteristics, such as gender affirming treatment, without the free, prior and informed consent of the person;
- R. Ensure that legal provisions, regulations or any other administrative measures on the donation of blood, gametes, embryos, organs, cells or other tissues do not discriminate on grounds of sexual orientation, gender identity, gender expression or sex characteristics;
- S. Ensure inclusion of affirmative material on sexual, biological, physical and psychological diversity and the human rights of people of diverse sexual orientations, gender identities, gender expressions and sex characteristics in medical curricula and continuing professional development programmes.

RELATING TO THE RIGHT TO INFORMATION (PRINCIPLE 19)

STATES SHALL:

- G. Take legislative, administrative, and other appropriate measures to ensure that all persons have access to information about their civil, political, economic, social and cultural rights, including how these rights apply in relation to sexual orientation, gender identity, gender expression and sex characteristics;
- H. Make freely available and accessible, both online and otherwise, international and regional treaties and instruments; the national constitution, national laws and regulations; research studies, reports, data, archives; reports and information submitted by the State to international and regional bodies and mechanisms; and all other information as may be necessary to secure or enable the exercise of any human rights or fundamental freedoms or access to remedy for a violation of any such right;
- I. Recognise that the needs, characteristics and human rights situations of populations of diverse sexual orientations, gender identities, gender expressions and sex characteristics are distinct from each other, and ensure that data on each population is collected and managed in a manner consistent with ethical, scientific and human rights standards and made available in a disaggregated form.

RELATING TO THE RIGHT TO THE FREEDOM OF PEACEFUL ASSEMBLY AND ASSOCIATION (PRINCIPLE 20)

STATES SHALL:

- F. Respect, protect and facilitate the formation of associations for the purpose of promoting the rights of all persons, including on the basis of sexual orientation, gender identity, gender expression or sex characteristics;
- G. Ensure that associations which seek to promote human rights related to sexual orientation, gender identity, gender expression or sex characteristics can seek, receive and use funding and other resources from individuals, associations, foundations or other civil society organisations, governments, aid agencies, the private sector, the United Nations and other entities, domestic or foreign;
- H. Ensure that requirements and procedures to register associations, where they exist, are not burdensome or impose unjustifiable limitations, including on grounds of morality and public order;

- I. Ensure that the right to freedom of association applies equally to associations that are not registered, including associations working on issues related to sexual orientation, gender identity, gender expression or sex characteristics;
- J. Take positive measures, including affirmative action measures, to overcome specific challenges to the enjoyment of the freedom of association of groups that are marginalised and made vulnerable on grounds of sexual orientation, gender identity, gender expression or sex characteristics;
- K. Take positive measures to protect the right to association of service providers working with those discriminated against on grounds of sexual orientation, gender identity, gender expression or sex characteristics.

RELATING TO THE RIGHT TO SEEK ASYLUM (PRINCIPLE 23)

STATES SHALL:

- D. Ensure that a well-founded fear of persecution on the basis of sexual orientation, gender identity, gender expression or sex characteristics is accepted as a ground for the recognition of refugee status, including where sexual orientation, gender identity, gender expression or sex characteristics are criminalised and such laws, directly or indirectly, create or contribute to an oppressive environment of intolerance and a climate of discrimination and violence;
- E. Ensure that persons seeking asylum are protected from violence, discrimination and other harm committed on grounds of sexual orientation, gender identity, gender expression or sex characteristics, including during the determination of their claims and in reception conditions;
- F. Ensure that no person is denied asylum on the basis that a person may conceal or change their sexual orientation, gender identity, gender expression or sex characteristics in order to avoid persecution;
- G. Accept the self-identification of a person seeking asylum on the basis of sexual orientation, gender identity, gender expression or sexual characteristics as the starting point for consideration of their asylum claim;
- H. Ensure that persons seeking asylum are not refused asylum because they did not set out their sexual orientation, gender identity, gender expression or sexual characteristics as a ground for persecution on the first occasion they were given to do so;
- I. Ensure sensitive and culturally appropriate guidelines and training on sexual orientation, gender identity, gender expression and sexual characteristics for agents involved in the process of determination of refugee status and in managing reception conditions;

- J. Ensure respect for the dignity and privacy of persons seeking asylum at all times, including by recording information about a person's sexual orientation, gender identity, gender expression and sex characteristics only where it is lawful, reasonable, necessary and proportionate to do so, by storing it securely and by prohibiting its release to any person other than a person directly involved in the refugee determination process;
- K. Develop and implement guidelines on assessing credibility in relation to establishing a person's sexual orientation, gender identity, gender expression and sex characteristics when seeking asylum, and ensure such assessments are determined in an objective and sensitive manner, unhindered by stereotyping and cultural bias;
- L. Ensure that inappropriate, invasive, unnecessary or coercive medical or psychological testing or evidence is not utilised to assess a person's self-declared sexual orientation, gender identity, gender expression or sex characteristics when seeking asylum;
- M. Provide access to medical care and counselling appropriate to those seeking asylum, recognising any particular needs of persons on the basis of their sexual orientation, gender identity, gender expression or sex characteristics, including with regard to reproductive health, HIV information and therapy, hormonal or other therapy, and gender affirming treatment;
- N. Ensure that the detention of asylum seekers is avoided, and is only used as a measure of last resort and for the shortest possible time;
- O. Ensure that placement in detention, where used, avoids further marginalising persons on the basis of sexual orientation, gender identity, gender expression or sex characteristics or subjecting them to violence, discrimination or other harm;
- P. Ensure that solitary confinement is not used to manage or to protect persons at risk of discrimination, violence or other harm on the basis of sexual orientation, gender identity, gender expression or sex characteristics, and release or refer asylum seekers to alternatives to detention, if effective protection cannot be provided.

RELATING TO THE RIGHT TO FOUND A FAMILY (PRINCIPLE 24)

STATES SHALL:

- H. Protect children from discrimination, violence or other harm due to the sexual orientation, gender identity, gender expression or sex characteristics of their parents, guardians, or other family members;
- I. Issue birth certificates for children upon birth that reflect the self-defined gender identity of the parents;
- J. Enable access to methods to preserve fertility, such as the preservation of gametes and tissues for any person without discrimination on grounds of sexual orientation, gender identity, gender expression, or sex characteristics, including before hormonal treatment or surgeries;
- K. Ensure that surrogacy, where legal, is provided without discrimination based on sexual orientation, gender identity, gender expression or sex characteristics.

RELATING TO THE RIGHT TO PARTICIPATE IN PUBLIC LIFE (PRINCIPLE 25)

STATES SHALL:

- D. Take measures to ensure that sexual orientation, gender identity, gender expression and sex characteristics are not used as grounds to prevent a person from exercising their right to vote;
- E. Develop and implement affirmative action programmes to promote public and political participation for persons marginalised on the basis of sexual orientation, gender identity, gender expression or sex characteristics.

RELATING TO THE RIGHT TO PROMOTE HUMAN RIGHTS (PRINCIPLE 27)

STATES SHALL:

- F. Enact a law, including to establish, designate or maintain an adequately resourced mechanism, for the protection of defenders of the rights of persons who experience or are at risk of violations on the basis of sexual orientation, gender identity, gender expression or sex characteristics;
- G. Ensure the participation of individuals and organisations working on human rights issues related to sexual orientation, gender identity, gender expression or sex characteristics in public and political decision-making processes that affect them.

ADDITIONAL RECOMMENDATIONS

All members of society and of the international community have responsibilities regarding the realisation of human rights. We therefore further recommend that:

- Q.** National human rights institutions ensure that in their programmes and activities they take action on human rights issues relating to sexual orientation, gender identity, gender expression and sex characteristics, mainstream those issues in all their functions, including complaint handling and human rights education, and promote the inclusion of persons of diverse sexual orientation, gender identity, gender expression and sex characteristics in their leadership and staff;
- R.** Sporting organisations integrate the Yogyakarta Principles (2006) and these Additional Principles (2017), as well as all relevant human rights norms and standards, in their policies and practices, in particular:
 - i. Take practical steps to create welcoming spaces for participation in sport and physical activity, including installation of appropriate changing rooms, and sensitisation of the sporting community on the implementation of anti-discrimination laws in the sporting context for persons of diverse sexual orientations, gender identities, gender expressions, and sex characteristics;
 - ii. Ensure that all individuals who wish to participate in sport are supported to do so irrespective of sexual orientation, gender identity, gender expression and sex characteristics, and that all individuals are able to participate, without restriction, subject only to reasonable, proportionate and non-arbitrary requirements to participate in line with their self-declared gender;
 - iii. Remove, or refrain from introducing, policies that force, coerce or otherwise pressure women athletes into undergoing unnecessary, irreversible and harmful medical examinations, testing and/or procedures in order to participate as women in sport;
 - iv. Take measures to encourage the general public to respect diversity based on sexual orientation, gender identity, gender expression and sex characteristics in sports, including measures to eliminate hate speech, harassment, and violence at sports events.

THESE ADDITIONAL PRINCIPLES, STATE OBLIGATIONS AND RECOMMENDATIONS reflect the application of international human rights law to the lives and experiences of persons of diverse sexual orientations, gender identities, gender expressions and sex characteristics, and nothing herein should be interpreted as restricting or in any way limiting the rights and freedoms of such persons as recognised in international, regional or national laws or standards.

SIGNATORIES TO THE ADDITIONAL PRINCIPLES AND STATE OBLIGATIONS

Philip Alston (*Australia*), UN Special Rapporteur on extreme poverty and human rights

Ilze Kehris Brands (*Latvia and Sweden*), Member, UN Human Rights Committee; Senior research fellow, Raoul Wallenberg Institute of Human Rights and Humanitarian Law

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Edwin Cameron (*South Africa*), Judge, Constitutional Court of South Africa

Morgan Carpenter (*Australia*), Founder, Intersex Day Project; Co-executive director, Organisation Intersex International Australia; Consultant, GATE

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Eleanora Lamm (*Argentina*), Human Rights Director at the Supreme Court of Justice of Mendoza; Member of the National Committee on Ethics in Science and Technologies

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Monica Mbaru (*Kenya*), Judge, Employment and Labour Relations Court

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